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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 34

DAVID BROCK, PETITIONER,

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED JANUARY 28, 1952
CERTIORARI GRANTED MARCH 31, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 34

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IN SUPERIOR COURT OF EDGECOMBE COUNTY, STATE OF NORTH CAROLINA

S. T. A T. E	)	
	)	
v.	)	From Edgecombe
	)	
DAVID BROCK	)	

Before HARRIS, J., March Term, 1951, Edgecombe Superior Court. DEFENDANT APPEALED.

STIPULATION OF COUNSEL

It is agreed by the Solicitor for the State and counsel for the defendant David Brock that at the March Term, 1951, Superior Court of Edgecombe County, duly constituted and organized, and regularly and lawfully held, with Judge W. C. Harris presiding, the case of State v. David Brock came on for trial and was tried before said Judge and a jury.

This 6th day of May, 1951.

GEORGE M. FOUNTAIN,
Solicitor for the State.
ROBERT S. CAHOON,
Attorney for David Brock.

STATEMENT OF CASE ON APPEAL

Be it remembered that at a regular term of the Superior Court for the County of Edgecombe for the trial of criminal cases, opened and held in the Courthouse in the City of Tarboro on the 5th day of March, 1949, presiding and

holding said Court according to law the Hon. W. C., Harris, Presiding Judge of the Second Judicial District.

Appearing and prosecuting on behalf of the State, Hon. George M. Fountain, Solicitor of the Second Judicial District.

At the Regular Term of the Superior Court for the County of Edgecombe, for the trial of criminal and civil cases, opened and held in the City of Tarboro on the 17th day of October, 1949, Hon. Leo Carr, Presiding Judge of the Second Judicial Circuit, then presiding and holding said court according to law, the Grand Jury, through their foreman, returned into Court the following bill of indictment as a "True Bill":

BILL OF INDICTMENT (DEFENDANT BROCK)

STATE OF NORTH CAROLINA SUPERIOR COURT
EDGECOMBE COUNTY OCTOBER TERM A.D. 1949

The Jurors for the State upon their oath present that David Brock late of the County of Edgecombe, on the 16th day of September in the year of our Lord one thousand nine hundred and forty-nine, with force of arms, at and in the County aforesaid, did, unlawfully, willfully, maliciously and feloniously in a secret manner, assault, beat and wound one J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway and Olla Mae Hathaway by waylaying or otherwise, with a deadly weapon, to wit: a rifle, with intent to feloniously kill and murder the said J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway and Olla Mae Hathaway to the great damage of the said J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway, and Olla Mae Hathaway, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

FOUNTAIN, Solicitor.

A True Bill:
E. F. BARKER, Foreman, Grand Jury.

The proceedings were thereafter had at said term of court as are indicated in the "Plea of Former Jeopardy" and with its attached "Exhibit A," hereinafter set forth. To avoid needless repetition reference is here made to those documents.

On March 7, 1951, during said March 1951 Term of said Court, this case was called for trial. At the time of his arraignment, and before any other plea, defendant David Brock entered the following written and sworn plea of former jeopardy:

PLEA OF FORMER JEOPARDY

Now comes the defendant, David Brock, and respectfully shows unto the Court:

1. That the defendant is charged in a bill of indictment herein with the crime of secret felonious assault upon J. D. Wyatt, Mrs. J. D. Wyatt, Alton Hathaway, Ola Mae Hathaway, and Barbara Jean Hathaway in Edgecombe County, North Carolina, on September 16, 1949.

2 Said bill of indictment was duly and properly issued and returned by the Grand Jury of Edgecombe County during the October 1949 Term of this Court. Honorable Leo Carr; one of the Judges of the Superior Courts of North Carolina and presiding Judge for this judicial district at that time, was then presiding over this court. Judge Leo Carr was then duly and properly commissioned, designated and empowered to preside over this court. The term of court was duly and regularly constituted in every respect, and had complete and full jurisdiction of the defendant and of the criminal action.

3. The defendant was then placed on trial on the aforesaid valid indictment before this court, a court of competent jurisdiction, after being properly arraigned and after having entered a plea of "not guilty," and a competent jury was properly drawn, properly impaneled and properly sworn to make a true deliverance in the case. (See S. v. Bell, 171 SE 50, 205 NC 225.) Said bill of indictment appears in the record and file of this case, and is by reference included herein. (See dissenting opinion by Stacy, C.J., and Brogden, J., in S. v. Ellis, et als, 200 NC 77, 156 SE 157.)

4. The State then offered evidence as is indicated in the attached Exhibit A, which consists of excerpts from the original transcript of record which was prepared by the official Court Reporter at the said October 1949 Term, and is incorporated herein by reference to show the proceedings therein portrayed which then transpired. The State offered the testimony of witnesses:

Alton Hathaway,
Sheriff Tom Bardin,
J. H. Everett,
Jim Cook, and
Elmer Matthews.

The excerpts are placed in chronological and narrative form for the convenience of the Court.

5. At the conclusion of all its evidence the State moved that a juror be withdrawn and a mistrial ordered and that the case be continued until a later date.

6. The State moved upon the theory that it would at a later date be able to present a stronger case against the defendant David Brock in that its witnesses Cook and Matthews might at a later date testify differently or to additional facts than at the first trial.

7. The defendant David Brock objected to and resisted the motion.

8. The Court made certain findings of fact which appear in Exhibit A and allowed the State's motion, all of which appears in Appendix A. This was done without cause or proper cause.

9. The defendant in apt time and manner objected to the Court's findings of fact, to its action in withdrawing a juror and declaring a mistrial, and the defendant properly reserved exceptions to each of said actions and rulings by the Court.

10. The defendant was at said October 1949 Term of this Court tried for the same offense for which and of which he is now charged in this Court in this criminal action (See STATE v. MANSFIELD, 207 NC 233, 176 and Article I, Section 17, of the Constitution of North Carolina), and was at said October 1949 Term of this Court put in jeopardy of life and limb and liberty for the same offense and upon the same bill of indictment upon which he stands charged in this Court and upon which the State again seeks to put him on trial and in jeopardy of life, limb and liberty. (See Amendment V of the United States Constitution.)

11. The defendant has previously been put in jeopardy and tried for the same offense for which it is now sought herein to put him again in jeopardy and upon trial, all in violation of his rights under the constitutions and laws of North Carolina and of the United States, including Article I, Section 17 of the Constitution of North Carolina, Amendment V of the Constitution of the United States, and the due process clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant prays the Court that he be discharged and go forth without day.

FOUNTAIN & FOUNTAIN
ROBERT S. CAHOON
Attorneys for Defendant.

NORTH CAROLINA,
EDGECOMBE COUNTY,

David Brock, being first duly sworn, deposes and says that he is the defendant in the above entitled case, and that he has read the foregoing and annexed plea of former jeopardy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things alleged on information and belief and as to some matters of record and as to some matters of law, and as to those matters and things he is informed and believes it to be true.

DAVID BROCK

Sworn to and subscribed before
me this 7th day of March, 1951.

LUCY G. MILLS
(SEAL) Notary Public
My commission expires Jan. 30, 1952.

EXHIBIT A: Excerpts from official Transcript of Record prepared by Miss Virginia B. Vincent, official court reporter, in Case of State v. David Brock, No. 672, October 1949 Term of Superior Court of Edgecombe County, North Carolina.

Excerpts are placed in chronological and narrative form for the convenience of the Court.

STATE'S EVIDENCE

ALTON HATHAWAY, sworn, testified: Direct Examination by Solicitor Fountain:

I am the son-in-law of Mr. J. D. Wyatt. I married his daughter. On or about the 16th of September I went over to Mr. Wyatt's home to spend the night. My wife and baby were there. My child was about a month old. Her name is Barbara Jean. My wife's name is Ola Mae. We occupied the front left-hand room facing the house. We went to bed that night. There was one bed and one couch in that room. There was a basket which the baby was kept in. We went to bed about 9:30 or 9:45 at night. We got back up again to get milk for the baby. That was

about ten o'clock. My wife got up. She was up three or four minutes seeing about the baby. The light was on. After she went to bed the house was in darkness.

The house is located on Highway 264 west of Tarboro, about four miles out. It sets about 40 or 45 feet off the highway.

After my wife had gone to bed, we were aroused by shots. That was approximately 15 minutes after my wife had gone back to bed. I had not gone to sleep. I heard an automobile going west shortly before I heard the shots. I could tell by the sound that the automobile slowed down. I did not hear it turn around. I heard it pick up speed. Then it was going toward Tarboro. Just as the car got at the right-hand corner of the house facing the road the shots began. I determined the position of the car from the firing and from the noise of the car. Five shots were fired in rapid order. Four came in the room we were in. One went over the porch. There were two windows in the room facing the road. The shots came through the window. Two went through the glass part of the window, which was raised. Two went through the lower screen part. The nearest bullet in the wall from where my baby was laying was 36 or 40 inches. There were two bullets in that wall. The nearest one from where my wife and I were in bed was about 5 feet. It was nearer my wife, about 5 feet from her. Another bullet was found lodged in the side wall behind a picture. One glanced off and was found under the bed.

SHERIFF TOM BARDIN, being sworn, testified:
Direct Examination by Fountain, Solicitor:

I am Sheriff Tom Bardin. On September 16th I saw Alton Hathaway and J. D. Wyatt after the shooting that took place that Hathaway testified about. I conducted an investigation of the shooting. As a part of the investigation I made an effort to locate David Brock. I first saw him, after I began my investigation, in the

yard of his home on Fountain Street. He was in a car I had seen on St. James Street before going to his house. He was the only person in the car. When I saw it on St. James Street, he was headed east toward Main Street. I was going west. The car lights were on. We turned around to try to overtake the car. I had lost sight of the car. It was beginning to rain. Just a short time later I saw him in the yard. I went over to Fountain Mill village. This was about a mile and a half or two miles from where I first saw the car on St. James Street.

During the trip I did not see Brock's car until I got near his house. After I made a turn onto Fountain Street I saw some lights on an automobile flash on and then off and then pull into a house. The headlights were not burning on that car. I saw the brake lights. It went into David Brock's yard. I pulled up beside the car that was stopped and David Brock was getting out of it. Nobody else was in the car. Officer Everett was with me. That was a few minutes before 11:00 o'clock. St. James Street is the same as U. S. Highway 258, the same road J. D. Wyatt lives on.

When I saw Brock at his home we called him to get into our car, that we wanted to talk to him.

In the course of our conversation, Mr. Wyatt or Mr. Everett, or I one, asked him what did he know about the shooting into Mr. Wyatt's house some few minutes before. He said he knew nothing about it. That he had been on picket duty at the back gate all night and had not left there and that we couldn't pin that on him.

He stated that he was on picket duty at the back gate at all times and did not leave except to get some coffee at Jim Cook's house.

I did not bring him in at that time.

Later on that night I took Jim Cook and Elmer Matthews in custody. Thereafter, David Brock was taken in custody.

After the three were arrested, I had a conversation with Jim Cook, Elmer Matthews and

David Brock together. This took place in the County jail. It was after they were taken in custody and on the same night of their arrest. At the time I did not offer any reward, hope of reward or promise to either of them. I did not offer any threat, force or any compulsion of any nature to require either of them to say anything. I had not made any promise to David Brock concerning this case. I told Mr. Cahoon that I assured Brock the next day that if he would tell me certain things, I would not use it against him. I am not purporting to tell anything that was said by David Brock after I had that understanding with him the next day.

On the night of September 16th, in the presence of David Brock, Jim Cook stated that he, Jim Cook, Elmer Matthews and David Brock went to the home of J. D. Wyatt on Elmer Matthews' car and with his, Jim Cook's, gun, and that Brock fired the gun into the home of J.D.Wyatt.

Elmer Matthews was present when that statement was made. I asked Elmer Matthews what if anything he had to say to that statement. He said, "That's right."

I asked David Brock what if anything he had to say. He said, "I have nothing to say."

RECROSS-EXAMINATION by Robert S. Cahoon, Counsel for Defendant:

Q Sheriff, David Brock had already told you that he didn't know anything about that, hadn't he?

A He did not say that.

Q Well, you went to his house, didn't you?

A Yes, sir.

Q And told him there had been a shooting around Wyatt's house and he said he didn't know anything about it?

A He said, "You can't pin that on me."

Q He said he had been on picket duty and that he didn't know anything about it, didn't he?

A He said, "You can't pin that on me."

Q You are denying that he said it?

A He said, "You can't pin that on me."

Q You asked him, "What do you know about the shooting?" didn't you?

A Someone asked him that, I said. One of us.

Q And his reply was that he knew nothing, wasn't it?

A He replied that he had been on picket duty at the back gate and had not left except to go to Jim Cook's house to get coffee and that we could not pin that on him.

Q He replied, "Nothing," did he not?

A He replied that he had been on picket duty at the back gate and stated that we couldn't pin that on him.

Q Did he ever use the word "nothing"?

A I don't recall.

COURT REQUESTS THE REPORTER TO READ THE ANSWER OF THE WITNESS ON DIRECT EXAMINATION. ANSWER WAS READ AS FOLLOWS: "He said he knew nothing about it. That he had been on picket duty at the back gate all night and had not left there and that we couldn't pin that on him."

BY THE COURT: What is your answer in view of the fact that the reporter has read the testimony and refreshing your recollection as best you can from that and other sources, what do you now say is your best recollection of what was said by Brock at that time?

A Well, sir, I am in a difficult position. I have stated one thing and then denied it.

Q Well, it is a question of what your best recollection is, and according to the reporter's notes he said "nothing" when you asked him what he knew about it, and that he was on the picket line. Now, you may say whether or not that is correct, or if your recollection is different.

A Well, I will have to say that that is correct. That he said he knew nothing about it, that he was on duty and they could not pin it on him.

RECROSS-EXAMINATION by Cahoon - continued:

Q Now, in jail there when you testified about what Cook said, Brock said, "No, I'm not

making a statement until I see a lawyer," isn't that right, Sheriff?

A No, sir. He definitely did not say that.

Q And you are just as sure about that as you were a minute ago about his not saying that he knew nothing about it?

A The only statement he made in the jail was, "I have nothing to say."

Q You are just as sure about that as you were about his not saying he knew nothing about it?

A There is no doubt in my mind about this.

Q You had no doubt in your mind about the other and you told me time and time again, "No sir, he did not say it." And you know this boy's liberty is at stake, don't you?

Objection - sustained.

Q How about your memory, Sheriff? Does it come and go at five-minute intervals?

A I've got a pretty good memory. I just got confused.

Q You don't know anything about what Brock did or didn't do, except what Cook told you, do you?

A I'd rather not answer that.

Q All right. I'll withdraw the question out of tenderness of feeling toward you, Sheriff. Now, you testified that St. James Street is the same thing as this highway Mr. Wyatt lives on, didn't you?

A Yes, sir.

Q That's Highway 258, isn't it?

A Yes.

Q He lives about four miles from town, doesn't he?

A Yes.

Q Is it St. James Street when it gets to Pinetops and Farmville?

A No, sir.

Q It is not St. James Street when it gets to Wyatt's house, is it?

A No, sir.

Q And this boy was four miles from Wyatt's house when you saw him, wasn't he?

A Yes, sir.

Q And you are not even sure it was his car, are you?

A I said I don't know his car.

Q And where is the main entrance into that mill over there?

A It is on Office Street.

Q And that is where the office personnel goes in, isn't it?

A Yes.

Q And that is the main gate, isn't it?

A It's right nearby.

Q And the main office is there and not on St. James Street where you said it was, isn't it?

A The main gate where everyone goes in with the exception of office personnel is.

Q My question was: Is the main office on a different street entirely from where you testified the front gate was?

A I said the office was on Main Street.

Q When you say "front gate" that is your terminology, isn't it?

A That is my terminology.

Q To Mr. Carter the front gate might be over there where he walks in every morning, might it not?

Objection - sustained.

Q Sheriff, let's refresh your recollection a little bit more. When you asked Matthews about Cook's statement, he said, "That's what he says"?

A He said, "That's right," and then, "That's what he says".

Q Meaning Cook?

A Yes.

J. H. EVERETT, being sworn, testified:

Direct Examination by Solicitor Fountain:

I am a police officer of the Town of Tarboro. I was in the car with Sheriff Bardin the night Mr. Wyatt's house was shot into before David Brock was first talked to by the Sheriff. I saw David Brock on his car on St. James Street

shortly before seeing him at his home. I knew his car when I saw it. I had seen it earlier that night. I came to work at 8:00 o'clock and it was very shortly after that we were patroling the neighborhood of Hart Mill. The car was parked beside the picket tent on St. James near the front gate. I can't say exactly what time it was. I saw the defendant David Brock standing close to his car. At the time I saw the car with Sheriff Bardin it was coming towards town, on St. James Street. We were going in the opposite direction. That was between 10:30 and 11:00 o'clock. The lights were on when we met it. The Sheriff turned his car around. I could not see the car that had just passed after the Sheriff turned around. Then we went to Brock's home. We saw the automobile near there. It was running without lights. He drove up in his front yard. Brock got out of the car, nobody else.

JIM COOK, duly sworn, testified:

My name is Jim Cook. I know David Brock. I saw him on the night of September 16.

Q Did you see him in an automobile which went by the home of J. D. Wyatt?

(Witness Jim Cook objects to answering on the ground the answer would tend to incriminate him, and upon his constitutional right not to be so examined. Objection sustained.) The same procedure was had as to the following questions:

Q Do you know who fired a rifle at the home of J. D. Wyatt?

Q Did David Brock tell you whether he shot at J. D. Wyatt's house or not?

Q Did you see anyone shoot at the house of J. D. Wyatt?

UPON THE COURT MOVING that the witness Jim Cook would not be required to answer the

question, "Did you see anyone shoot in the house of Mr. J. D. Wyatt?" the Solicitor for the State, for the purpose of the record and in the absence of the jury, requests that the Court find the facts upon which said ruling was made. THE COURT FINDS THE FACTS AS FOLLOWS: That the witness Jim Cook was convicted by a jury at this term of court of the charge of assault with a deadly weapon, the charge being one which grew out of the same transaction with which the defendant David Brock is charged, and that the evidence in the case in which the witness Cook was convicted tended to show that the defendant Brock fired the rifle bullets into the home of J. D. Wyatt and that the witness Cook was present, aiding and abetting said Brock in the commission of said offense. At the time said Cook was called as a witness in this case no judgment had been entered in his case on the charge of assault with a deadly weapon. Counsel for Cook informs the Court that in the event of an adverse judgment that Cook will appeal therefrom to the Supreme Court.

Objection by the defendant David Brock to this finding of fact. Overruled. Exception.

ELMER MATTHEWS, duly sworn, testified:
Direct Examination by Solicitor Fountain:

THE WITNESS ELMER MATTHEWS OBJECTS TO TAKING THE STAND and stands on his constitutional rights not to be examined as a witness upon the ground that the examination might tend to incriminate him. THE COURT FINDS that no questions have been asked of the witness by which the Court would determine whether or not there would be any evidence elicited from the witness that would tend to incriminate him, and therefore overrules the objection to taking the stand.

Q Your name is Elmer Matthews?
A Yes, sir.
Q Do you know David Brock?
A Yes, sir.
Q Did you see him on the night of September 16th?
Objection - overruled - exception.
A Yes, sir.
Q Did you see him in an automobile which went by the home of J. D. Wyatt?
Objection - sustained.
Q Do you know who fired a rifle at the home of J. D. Wyatt?
Objection - sustained.
Q Did David Brock tell you whether he shot at J. D. Wyatt's house or not?
Objection - sustained.
Q Did you see anyone shoot at the house of Mr. J. D. Wyatt?
Objection sustained.

UPON THE COURT MOVING that the witness Elmer Matthews would not be required to answer the question, "Did you see anyone shoot at the house of Mr. J. D. Wyatt?" the Solicitor for the State, for the purpose of the record and in the absence of the jury, requests that the Court find the facts upon which said ruling was made. THE COURT FINDS THE FACTS as follows: That the witness Elmer Matthews was convicted by a jury at this term of court of the charge of assault with a deadly weapon, the charge being one which grew out of the same transaction with which the defendant David Brock is charged, and that the evidence in the case in which the witness Matthews was convicted tended to show that the defendant Brock fired the rifle bullets into the home of J. D. Wyatt and that the witness Matthews was present, aiding and abetting said Brock in the commission of said offense. At the time said Matthews was called as a witness in this case no judgment had been entered in his case on the charge of assault with a deadly weapon. Counsel for Matthews informs the Court that in the event

of an adverse judgment that Matthews will appeal therefrom to the Supreme Court.

OBJECTION BY DEFENDANT DAVID BROCK TO THIS FINDING OF FACT. OVERRULED. EXCEPTION.

MOTION BY THE STATE THAT A JUROR BE WITHDRAWN AND A MISTRIAL ORDERED AND THE CASE CONTINUED PENDING THE FINAL JUDGMENT IN THE CASE OF "STATE v. ELMER MATTHEWS AND JIM COOK."

BY THE COURT: THE COURT FINDS AS A FACT that the Solicitor for the State tried two cases growing out of the same transaction, STATE v. JIM COOK, and STATE v. ELMER MATTHEWS, and that the evidence in said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense; that the defendants Jim Cook and Elmer Matthews were convicted at this term of court on the charge of Assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of "State v. David Brock," and during the course of the trial undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State. Whereupon, counsel for said defendants advised them not to testify and to rely upon their constitutional rights not to give testimony in respect to matters that would tend to incriminate them for that no judgment had been entered in their cases and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered and the Court ruled that said defendants would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court. The Court being of the opinion that the ends of justice require that the State have available for its testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court, in

its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued.

DEFENDANT OBJECTS to the finding of facts, conclusions of law and the ruling of the Court. Overruled. EXCEPTION.

BY THE COURT:

Ladies and Gentlemen of the Jury, you have been listening for a part of yesterday and today to the trial of the case of "State v. David Brock" and have heard some argument in respect to the testimony of certain witnesses and part of the argument you did not hear, but the State having undertaken to offer the testimony of two witnesses, Jim Cook and Elmer Matthews, and for certain reasons that have been made to appear to the Court, the testimony of those witnesses, at the present time, is not complete and available to the State, the Court is of the opinion that the ends of justice require that this case not be completed and that a mistrial be ordered and this case continued to such time as the testimony of those witnesses might be available for the State without any legal objections to it. Therefore, the Court in its discretion has withdrawn a juror and ordered a mistrial in this case and the jurors will not be concerned with the case any further.

The Court desires to thank you.

I, Virginia B. Vincent, official court reporter for the Second Judicial District of North Carolina in the Superior Courts of said District, do hereby certify that the foregoing and attached transcript of record in the case of "State v. David Brock" is a true and correct recording of the proceedings in said case.

This the 25th day of November, 1949.

/s/ VIRGINIA B. VINCENT
Reporter.

Sworn to and subscribed before me,
this 25th day of November, 1949.
EVELYN J. OVERTON,
Notary Public. (NOTARY SEAL)
My com. expires: January 21, 1951.

The proceedings then had on said plea were as set forth below in a statement of said proceedings reduced to writing, made a part of the record, and signed by Hon. W. C. Harris, Judge Presiding.

PROCEEDING AND RULING ON PLEA OF FORMER JEOPARDY

At the time of the arraignment, and before any other plea, the defendant David Brock entered the written and sworn plea of former jeopardy which is filed and appears of record. The Solicitor announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy.

The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same.

To the said ruling, defendant David Brock in apt time and manner objected and reserved an exception.

Defendant David Brock then moved the Court to permit his plea of former jeopardy to go to the jury, and the facts to be passed on by the jury.

The Court denied the motion. The defendant David Brock objected to said ruling in apt time and reserved an exception.

This 7th day of March, 1951.
W. C. HARRIS
Judge Presiding.

The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes defendant's
EXCEPTION NO. 1.

The foregoing exception to the Court's denial of his motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's
EXCEPTION NO. 2.

At this point, the Solicitor for the State announced in open Court that it, the State, would not ask for a verdict of guilty of secret assault, but would ask for a verdict of guilty of assault with a deadly weapon.

PLEA: Defendant then, reserving his rights under his plea of former jeopardy and his Exceptions heretofore set out, pleaded "Not Guilty." Whereupon a duly summoned jury was properly selected, impaneled and sworn to try the cause.

The verdict, judgment and appeal entries are hereinafter set forth.

STATE'S EVIDENCE

ALTON HATHAWAY, being sworn, testified:
(Direct Examination by Mr. Fountain)
On the night of September 16, 1949, my wife, my child Barbara Jean Hathaway and I spent the night at Mr. Wyatt's home. His home is located four miles out on the Wilson highway, west of Tarboro. It is the highway that goes to Wilson, out St. James Street, beyond the mill. Going from Tarboro to Wilson he lives on the right-hand side of the road. My wife, my child and I

were occupying the living room. That is the front room. The house sits about 50 feet from the highway. My child Barbara Jean was three or four weeks old. We were sleeping or preparing to sleep in the room. There was a bed there. There was a couch there which could be used to sleep upon. I believe it was in front of one of the windows. There are two rooms on the front of the house. Altogether there were four rooms and a back porch. Mr. Wyatt was occupying one of the back rooms. His wife was occupying the other front room. He was in the room behind the one I was in.

Sometime that night, just before it took place, I heard an automobile come by the house. As the car got in front of the house it started reducing speed. It was going toward Wilson. I could hear from the racing of the motor that it was turning around down the road. Then it started back toward town, picking up speed. Just as it got in front of the house five shots fired. I could tell from the sound that they were rifle shots.

Two bullets lodged in the wall dividing the front two rooms and one went straight back into the wall. Four shots came through the window of the room my wife, my child and I were in. The nearest one came to my child was 36 inches. She was then in a basket in front of a door which went into the back room. The bullet went over it and to the side. The bullet went into the wall. It came through. Two bullets lodged in the wall separating the two rooms. It was about a 16-foot room. My wife and I were on the opposite side of the room. The fourth bullet came straight into the room and lodged in the wall. Some of the bullets were found. I think Mr. Wyatt turned them over to the Sheriff. I think we found three or four of them. The fifth one went up over the porch. It struck the building just over the porch and went into the loft of the house. When the shots were fired I got up and so did Mr. Wyatt. We came to town to the Police Station. I saw Mr. J. A.

Everett there. I saw Sheriff Bardin. We started out to Mr. Wyatt's. We did not get out there the first time.

On the way to Mr. Wyatt's we saw Brock's car come out of the new village over at Hart Mill. It was coming up St. James Street. At that time the car's lights were on. We turned around when we met Brock's car. We followed him over to his house. About three houses down from his house the lights on Brock's car went out. It was rainy or misty that night.

It was 30 to 45 minutes after the shooting that I saw Brock's car. I saw it on the same street that goes by J. D. Wyatt's house when it gets out in the country. We followed the car to Brock's house. He was the only one in it at the time. I was then a member of the Textile Union organized and existing at Hart Mill at the time. My wife was not an employee of the mill. J. D. Wyatt was a watchman at the gate. He was not a member of the union. At that time the union was on strike. It had been on strike about three months. I went to the picket tent early that night, on my way to Mr. Wyatt's house, I went there about 7:30. I saw David Brock, Jim Cook and A. Q. Blackmon there. I did not see Elmer Matthews.

It was misting rain, and I stopped up under the tent. There was a crowd at the corner of the tent. That's where I saw them, standing in a group. They were standing together. Just before the car came by, prior to the shooting, there was a light on in the room my wife and I occupied. We had gone to bed. My wife got up to get the baby some milk. The light went off just a few minutes before the car came by, going by the house. At the time the car got there all the lights in the house were out. The shooting was about 8:30 or 9:00 o'clock.

CROSS-EXAMINATION (by Mr. Cahoon)

I was a member of the union when this thing occurred. I was friendly with David Brock. There were no hard feelings between us. I

stopped at the picket tent on my way home. There was a crowd of people there. I remember seeing Brock and Cook there, but not Matthews. This group got off to itself. I would say there were maybe 25 or 30 people there altogether. People were standing in little groups talking to one another. I spoke to different ones. I did not speak to Cook and Brock. I stood there until it quit raining; then I went on home. It was about 7:30.

I testified about this once before. I don't remember whether I then said the shooting happened around 10:00 or 10:45. I would say the shooting happened between 8:30 and 9:30. (Witness is handed transcript of testimony in previous trial and reads.) Now, after having read that and refreshing my memory it is my best recollection that my wife and I went to bed about 9:30. After that my wife got up for milk for the baby. It was not yet ten o'clock. Then we went back to bed. About ten minutes later I heard a car pass. It was getting up to about ten o'clock. It had been three or four hours since I saw Brock and Cook. I did not see the car. I do not know who was in it. There had been no hard feelings between me and Blackmon. We were members of the union, working together at the time. When I came in town, 30 or 40 minutes after it happened, I saw Brock's car in town. It came out of the New Hart village. It was not coming from the direction of Wyatt's house when we met it, at the time we first saw it. Where we saw Brock's car was three or four miles away from where the shooting happened. I could watch Brock's car's tail lights all the way to his house. Just before you get to Brock's house the houses and lots are small. He cut his lights off just before he got to his house and cut up into his yard. That is all I know about it.

J. D. WYATT, being sworn, testified: Hathaway, his wife and child were in my home on the

night of the shooting. I had been employed at Hart Mill prior to that night, and since. I had been a union member. I thought I was at the time. If I was not a member at the time I did not know it. My job at the mill was watching. I was home the night of September 16.

Q Did you attempt to go to work the morning of the 14th?
Objection - overruled - exception.
EXCEPTION NO. 3.
A I attempted to.
Motion to strike - overruled - exception.
EXCEPTION NO. 4.

Q Do you recall what day of the week that was?
Objection - overruled - exception.
EXCEPTION NO. 5.
A I think it was on Wednesday.
Motion to strike - overruled - exception.
EXCEPTION NO. 6.

Q Was the shooting the following Friday night?
Objection - overruled - exception.
EXCEPTION NO. 7.
A Yes, sir.
Motion to strike - overruled - exception.
EXCEPTION NO. 8.

Q On that Wednesday morning how many persons were at the mill gate when you started to work?
Objection - overruled - exception.
EXCEPTION NO. 9.
A When I came down to work about 5:45 there wasn't anybody at the gate when I drove up in my car, but across the street at the picket tent there was approximately 75 or 50 people over there.
Motion to strike - overruled - exception.
EXCEPTION NO. 10.

Q Where did you put your car?
Objection - overruled - exception.
EXCEPTION NO. 11.

A Across the street below the picket tent.
Motion to strike - overruled - exception.
EXCEPTION NO. 12.

Q Then where did you go?
Objection - overruled - exception.
EXCEPTION NO. 13.
A I started to go to get into the gate to go to work.
Motion to strike - overruled - exception.
EXCEPTION NO. 14.

When I started to get out of the car Jim Cook . . .
Objection and motion to strike - overruled - exception.
EXCEPTION NO. 15.

Jim Cook started across the street and said, "Come on boys if you are going to back me up."
Objection and motion to strike. Defendant moves that witness be qualified to show defendant was not present. Overruled. Exception.
EXCEPTION NO. 16.

So they crossed the street. I guess 40 or 50 of them and lined up in front of me.
Motion to strike. Overruled. Exception.
EXCEPTION NO. 17.

Q Do you know whether or not Brock or Blackmon were in that group?
A No, I don't know about that.
Motion to strike all of the foregoing testimony pertaining to the incident.
Overruled. Exception.
EXCEPTION NO. 18.

At this point defendant moved that a juror be withdrawn and a mistrial directed on the grounds that the foregoing evidence was improperly permitted to go to the jury, to his prejudice. Overruled. Exception.
EXCEPTION NO. 19.

Q What did Jim Cook say to you when you went to the gate to go in?

Objection - overruled - exception.

EXCEPTION NO. 20.

A He said if I went back to work the undertaker would have a job.

Motion to strike. Overruled. Exception.

EXCEPTION NO. 21.

I said all right, boys. If that's the way you feel about it let's go down to Wooten's and get some coffee. I'll pay for it.

Motion to strike. Overruled. Exception.

EXCEPTION NO. 22.

At this point defendant again moved that a juror be withdrawn and a mistrial ordered on the grounds that the foregoing testimony was improperly permitted to go to the jury to his prejudice. This constitutes

EXCEPTION NO. 23.

I was in the room behind the room Alton Hathaway was in. One bullet came in there. It came through the wall and through a mirror and lodged in a dresser in the room I was in. Alton and I went to the police station after the shooting.

CROSS-EXAMINATION (by Mr. Cahoon)

On September 14 I did not see Brock or Blackmon at the time I went to the mill gate.

JIM COOK, being sworn, testified (Direct Examination by Mr. Fountain):

I am a nephew of Mr. Wyatt. Prior to the shooting I was a Hart Mill employee on strike. On the day of the shooting I saw David Brock, A. Q. Blackmon and Elmer Matthews. I first saw them down at the picket tent, I believe. We went to my home from the picket tent. Sometime that evening we went to a road known as Lover's Lane, before dark. There was some talk about what they were going to do with Wyatt, about

getting even with him. All were talking. I have already been tried and am serving a sentence now. The same thing applies to Elmer Matthews. We left Lover's Lane and went to the mill. We went on Matthews' car. There were Brock, Blackmon, Matthews and me.

That night we went to my home, all four of us. We drank coffee there. We went on Matthews' car. Graham Griffin came out of my house first. He was with us. Graham asked, "Where is your rifle, Jim?" I told him it was in the other room. The next time I saw him he was sitting in the car. When I saw the rifle again it was in Matthews' car. All five of us had been drinking coffee at my house. We all left together. We went back to the picket tent. Me and Griffin got out. I saw Blackmon, Brock and Matthews again in about 30 minutes. They came back and called me, said, "Let's ride around somewhere." I got in and they went out toward Wyatt's house. Matthews was driving. I was in the front seat. Brock was on the right side in the back. Blackmon was in the back. I did not know where we were going. Just before we got to Wyatt's house I found out.

There was some discussion about who could shoot from the left shoulder, between Brock and Blackmon. I said that was a wrong thing to do, so they didn't do it the first time. They went on down to the next house and turned around and came back and when they got right in front of the house Brock said he was going to shoot over the house. Instead of shooting over it they shot in it. They shot five times. It was my rifle. After the shooting they took me back to my house. I got out. David Brock carried my rifle back in the house. I went back to the picket tent with them. I left them at the office gate. They went around to the back gate, I believe. I saw Brock's car at the picket tent early that night. I talked with Brock or Blackmon or Matthews down at the tent before they went to my house. I saw Alton Hathaway at the tent earlier that night.

Q Do you remember two mornings earlier before that when Mr. Wyatt reported to go to work?
Objection - overruled - exception.
EXCEPTION NO. 24.
A Yes.
Motion to strike; overruled; exception.
EXCEPTION NO. 25.

Q How many people did you say were there?
Objection - overruled - exception.
EXCEPTION NO. 26.
A Maybe 40 or 50.
Motion to strike; overruled; exception.
EXCEPTION NO. 27.

Q Did Mr. Wyatt get in?
Objection - overruled - exception.
EXCEPTION NO. 28.
A I don't think he did that morning.
Motion to strike; overruled; exception.
EXCEPTION NO. 29.

After the shooting I first saw the police officers around 11 o'clock. I was at the office gate at the mill. They had my rifle.

Q Did you later on that night tell Sheriff Bardin what had happened?
Objection - overruled - exception.
EXCEPTION NO. 30.
A Yes.
Motion to strike; overruled; exception.
EXCEPTION NO. 31.

Q Do you remember what you told the Sheriff in the presence of David Brock?
Objection - overruled - exception.
EXCEPTION NO. 32.

At this point defendant moves that he be permitted to examine the witness and State's witness Sheriff Bardin to establish that prior to the time involved in this testimony the defendant had stated to Sheriff Bardin that he knew nothing about the shooting, and that at the time in question he did not

acquiesce in any statement made by Cook, but repudiated it and stated that he was standing on his constitutional right to make no further statement. Overruled. Exception.
EXCEPTION NO. 33.

A The Sheriff asked me was it my rifle and I said it was, and he asked me did I know who done the shooting and I told him David Brock and he wanted to know who was driving the car and I told him it was Elmer Matthews.

Motion to strike; overruled; exception.
EXCEPTION NO. 34.

CROSS-EXAMINATION (by Mr. Cahoon)

I have never threatened Mr. Wyatt. During all the time they held me in jail and questioned me at length and before I was tried and for the length of time that elapsed there I never mentioned to anybody that A. Q. Blackmon had anything to do with it. I was finally convicted and went to the road camp. I first went down to a camp near Ahoskie. After that I was transferred somewhere else and got sick with kidney trouble and had to go to the prison hospital in Raleigh. I got down pretty low and dejected in my mind. During the time I was in a camp near Ahoskie a State investigator came to see me. I told him I did not have anything to do with it and that I knew nothing in the world against Brock. He told me I ought to sit down and write Mr. Fountain about it. I thought he meant Mr. L. H. Fountain, the lawyer who represented me. I wrote that letter to Mr. Fountain while I was in camp. I did it of my own free will and accord. I said:

"Mr. Fountain, I talked to the S.B.I. last week and he said I should write and tell you what I can testify about in Brock's trial. Mr. Fountain, I don't know anything on Brock and therefore I cannot say anything against Brock. He did not have anything to do with the shooting. I'd rather pull the whole two years than appear against Brock."

I signed my name to that letter. Nobody in the world asked me to do that.

The first statement I made to the Sheriff I denied having anything at all to do with the shooting. I said somebody had borrowed my rifle and had taken it away, and I had nothing to do with it.

David Brock has always denied that he had anything to do with it, at all times.

REDIRECT EXAMINATION (by Mr. Fountain)

It was Mr. L. H. Fountain, Mr. V. E. Fountain, Mr. Robert Cahoon and Mr. Vinson Bridgers who represented me. When I addressed a letter to Mr. L. H. Fountain I thought he was the man the S.B.I. representative was talking about.

Q After you wrote that letter you talked to your father, did you not?

Objection - overruled - exception.

EXCEPTION NO. 35.

A Yes.

Motion to strike; overruled; exception.

EXCEPTION NO. 36.

Q Why did you decide to tell what you are now telling after you wrote the letter?

Objection - overruled - exception.

EXCEPTION NO. 37.

A That's when I talked to my father about it.

Motion to strike; overruled; exception.

EXCEPTION NO. 38.

He wanted me to tell the truth about it.

Motion to strike; overruled; exception.

EXCEPTION NO. 39.

SHERIFF TOM BARDIN, being sworn, testified (Direct Examination by Mr. Fountain):

I am Sheriff of Edgecombe County. On the night of September 16, 1949, I made an investigation of a shooting at Mr. Wyatt's home. I first went to Tarboro police station where I met Wyatt and he gave me the details. No de-

fendant had then been taken in custody. Mr. Everett, Mr. Hathaway, Mr. Wyatt and I started to Wyatt's home on St. James Street. We passed an automobile belonging to David Brock going in the opposite direction. We turned around to overtake him. When we turned we were unable to see any vehicle ahead of us but we proceeded until we were within 200 yards of Brock's home. We saw a brake or tail light flash on and saw this car turn into David Brock's yard. When we turned in there David was there. He was the only person in the car.

I might say right now that because of it being so long ago I may be a little vague in my remembrance of every detail, but we did talk to him about it. I did not take him in custody at that time. We left his house and went to the police station. Then I went to Mr. Wyatt's house. I found where someone had shot through the window into his front room which was a combination living room and bedroom. As I recall it there were three shots through the window pane and a fourth through the window sash. I never saw the fifth shot. I recovered two bullets and half of another. There were two holes as I recall, one over the mantelpiece and one through the wall. The mantel was opposite the window; and one a little lower and to the left as you face the mantel, which went all the way through the wall and lodged into the back of a dresser in an adjoining room. That was the back room which Mr. Wyatt said he was sleeping in.

There was a third, a sort of ricochet, in the right-hand wall as you went in the room. The baby crib was a little to the left of the window as you faced the window in the room. There was a bullet hole about 3 feet from the crib. It went all the way through the wall. From there I returned to the police station. Mr. Everett, Mr. Waldon and Jim Cook were there along with the Desk Sergeant. Jim admitted ---

Objection - overruled - exception.
EXCEPTION NO. 40.

Q What did Cook say?
Objection - overruled - exception.
EXCEPTION NO. 41.
A Cook stated that he and David Brock and Elmer Matthews were together, that they were on Elmer Matthews' car, Matthews was driving, the gun that was fired into the Wyatt home belonged to him and it was fired by David Brock.
Motion to strike; overruled; exception.
EXCEPTION NO. 42.

Then Elmer Matthews and Brock were picked up. Thereafter I talked with the three of them. I got the three of them together after Brock and Matthews were arrested.

Q What did Cook say in the presence of Brock and Matthews?
Objection - overruled - exception.
EXCEPTION NO. 43.

At this point defendant moves that he be permitted to show by the witness that defendant had, prior to the time being testified about, stated to the witness that he knew nothing about the shooting, that he in no way acquiesced in Cook's statement, that he stated at this time that he was standing on his constitutional right to make no further statement. Overruled. Exception.
EXCEPTION NO. 44.

A He stated in the presence of Brock and Elmer Matthews that the three of them went out there to Wyatt's house on Matthews' car with Matthews driving and Brock shot into the house and that the gun belonged to him, to Cook.
Motion to strike; overruled; exception.
EXCEPTION NO. 45.

I then asked the defendant Matthews if that was right and he said it was.
Motion to strike; overruled; exception.
EXCEPTION NO. 46.

I asked the defendant Brock if that was right.

He said, "I have nothing to say," and said he stood on his constitutional right to make no statement.

I talked to Jim Cook again in November 1950. I brought him from Hertford County Prison Camp near Ahoskie to be a witness, to testify against David Brock. He did not testify. The case was not tried.

Q What conversation did you have with him concerning this case with particular reference to Blackmon if he made any statement to you about Blackmon?

Objection - overruled - exception. EXCEPTION NO. 47.

A He stated that during the afternoon of September 16 he, Cook, Elmer Matthews, David Brock, A. Q. Blackmon, Clarence White, Bill Hoard and Graham Griffin met on Lovers Lane out between the prison camp road and the cemetery road and discussed getting Wyatt. That they returned to the mill picket line and dispersed. That later on that night he and David Brock, Elmer Matthews, A. Q. Blackmon and Graham Griffin went to Cook's home to get some coffee. While there the Griffin boy asked where his rifle was. He stated it was behind the bed. After drinking coffee they went back out to the car and that his rifle was in the car. He was told that Griffin carried the rifle out in his overalls pants leg and that they then went to the picket line and dispersed again until sometime later when Brock and Matthews and Blackmon got together and said, "Let's go for a ride." That they went on out to Wyatt's home and he asked them not to shoot in there and one of them said, I don't recall which, said when they started a job they finished it, and that Brock and Blackmon were in the back seat discussing before they got there which could shoot from leftshoulder going by, and since neither one of them could they turned around and on the return trip past Wyatt's house Brock fired into the home of Wyatt and then they returned to the picket line where they dispersed again. He,

Cook, went to the office gate picket tent and Matthews and Brock, I believe, went to the picket tent at the back gate and Blackmon got off at Virginia Avenue and went from there to his home.

Motion to strike - overruled - exception.
EXCEPTION NO. 48.

CROSS-EXAMINATION (by Mr. Cahoon)

When I first saw David Brock that night, before I talked to Jim Cook, Mr. Everett or I questioned David Brock. Brock said, "Buddy, what are you trying to do, pin something on me?" He said he was at the back gate on picket duty. Before his arrest he said he knew nothing about the shooting at Wyatt's house. After he was arrested he was asked about the shooting again. He said he was standing on his constitutional right to make no further statement.

Jim Cook told me several tales about this thing. At first he said he had nothing to do with it at all. He said Matthews and Brock borrowed his gun. Later he implicated himself, Matthews and Brock. Months later he implicated another man, Blackmon, and several others, Clarence White, Bill Hoard, Graham Griffin. His latest story is that he said, "Let's don't do that. Don't do it." In his earlier story he did not mention any protest. When Cook made a statement about it before Matthews, Matthews' statement was, "That's right, that's what he says."

At this point defendant moves that the testimony about purported admissions by Cook to Sheriff Bardin be stricken from the record. Overruled. Exception.
EXCEPTION NO. 49.

JIM COOK (RECALLED) testified for the State (Direct Examination by Mr. Fountain):

It was a .22 rifle used in the shooting.

RECROSS-EXAMINATION (by Mr. Cahoon)

Sometime in November I told my wife that the

authorities at the prison camp questioned me. They questioned me. I do not deny that they threatened me.

REDIRECT EXAMINATION (by Mr. Fountain)

Nobody has threatened me that I know of.

THE STATE RESTS

At the conclusion of the State's evidence the defendant moved for judgment as of nonsuit. Motion denied. Defendant excepts.

EXCEPTION NO. 50.

DEFENDANT RESTS

Defendant renews his motion for judgment as of nonsuit. Motion overruled. Defendant excepts.

EXCEPTION NO. 51.

Defendant moves that a juror be withdrawn and a mistrial order, assigning as grounds for the motion the matters to which exceptions have hereinbefore been noted. Motion overruled. Defendant excepts.

EXCEPTION NO. 52.

As no exception is based on the charge of the Court to the jury, the same is omitted from the record.

The jury retired and considered the case.

VERDICT: The jury returned and returned their verdict as to the defendant: "Guilty of an Assault With a Deadly weapon."

At this point defendant moved the Court to set aside the verdict and grant to him a new trial because of the matters and errors hereinbefore set out in exceptions. Motion denied. Defendant excepts.

EXCEPTION NO. 53.

JUDGMENT AS TO DEFENDANT DAVID BROCK

The defendant David Brock is confined to jail for a period of two years and is assigned to work the roads under the supervision of the State Highway & Public Works Commission.

W. C. HARRIS,
Judge Presiding.

Defendant objects and excepts to the entry of judgment as to him and gives notice of appeal to the Supreme Court of North Carolina.
EXCEPTION NO. 54.

APPEAL ENTRIES

From the foregoing judgment as to him the defendant appealed to the Supreme Court. Notice of appeal is given and accepted in open Court, and further notice is waived. By consent the defendant is allowed 60 days within which to prepare and serve case on appeal and the State allowed 30 days thereafter to prepare and serve counter-case or exceptions. Appeal bond is fixed at $100.00. Appearance bond is fixed at $2,000.00. This 8th day of March, 1951.

W. C. HARRIS,
Judge Presiding.

The defendant hereby tenders the foregoing as a true and perfect statement of case on appeal to the Supreme Court of North Carolina.
This 4th day of May, 1951.

ROBERT S. CAHOON,
Attorney for Defendant.

Service of the foregoing statement of case on appeal is duly accepted, and a receipt of a copy of the same is hereby acknowledged, May 7, 1951.

GEORGE M. FOUNTAIN
Solicitor.

STIPULATION

It is stipulated and agreed that the foregoing is a true and perfect statement of case on appeal to the Supreme Court of North Carolina in the above entitled case.

This 30 day of July, 1951.

GEORGE M. FOUNTAIN, Solicitor.
ROBERT S. CAHOON,
Attorney for Defendant.

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1. The defendant assigns as error the Trial Court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of fact, as shown by EXCEPTIONS 1 and 2 (R p 19).

ASSIGNMENT OF ERROR 2. The defendant assigns as error the Trial Court's permitting in evidence, over defendant's objection, testimony of witness as to an incident involving conversations concerning threats made by one Cook against a prosecuting witness, out of the defendant's presence, and in no way connected with the defendant, as shown by EXCEPTIONS 3 through 29 (R pp 23, 24, 25 and 27).

ASSIGNMENT OF ERROR 3. The defendant assigns as error that the Trial Court permitted in evidence, over defendant's objections, testimony as to admissions and confessions by one Cook implicating the defendant, as shown by EXCEPTIONS 30 through 34, and 40 through 49 (R pp 27, 28; 30, 31; 32 and 33).

ASSIGNMENT OF ERROR 4. The defendant assigns as error that the Trial Court permitted in evidence, over defendant's objections, testimony

as to a conversation between one Cook and his father concerning a confession implicating the defendant, and testimony by said Cook that this conversation caused him to decide to testify against Brock, as shown by EXCEPTIONS 35 through 39 (R p 29).

ASSIGNMENT OF ERROR 5. The defendant assigns as error the Trial Court's overruling the defendant's motions for judgment as of nonsuit as shown in EXCEPTIONS 50 and 51 (R p 34).

ASSIGNMENT OF ERROR 6. The defendant assigns as error the Trial Court's overruling the defendant's motion that a juror be withdrawn and a mistrial ordered, as shown by EXCEPTION 52 (R p 34).

ASSIGNMENT OF ERROR 7. The defendant assigns as error the Trial Court's overruling the defendant's motion that the verdict be set aside and that he be granted a new trial, as shown in EXCEPTION 53 (R p 34).

ASSIGNMENT OF ERROR 8. The defendant assigns as error the Trial Court's entering the judgment as to defendant and over defendant's exception, as shown by EXCEPTION 54 (R p 35).

Respectfully submitted,
ROBERT S. CAHOON,
Attorney for Appellant.

(TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT)

IN SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1951,
EDGECOMBE COUNTY

No. 75

STATE

vs.

DAVID BROCK

JUDGMENT—October 31, 1951

This cause came on to be argued upon the transcript of the record from the Superior Court, Edgecombe County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable W. A. Devin, Chief Justice, be certified to the said Superior Court, to the intent that the Judgement is affirmed.

And it is considered and adjudged further, that the Defendant and surety to the Appeal Bond, National Surety Corporation, do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-eight and 35/100 dollars ($38.35), and execution issue therefor.

A True Copy:

Adrian J. Newton, Clerk of the Supreme Court.

IN SUPREME COURT OF NORTH CAROLINA

No. 75—Edgecombe

STATE

v.

DAVID BROCK

Appeal by defendant from Harris, J., March Term, 1951, of Edgecombe. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, September 16, 1949, (G. S. 14-31).

There was a verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan and Assistant Attorney-General Moody and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for Defendant, Appellant.

OPINION, DEVIN, C. J.—Filed October 31, 1951

This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. State v. Dove, 222 N. C. 162, 22 S. E. 2d 231; State v. Guice, 201 N. C. 761, 161 S. E. 533. But the members of the Court are evenly divided in opinion (Justice Valentine not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook, in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

Valentine, J. took no part in the consideration or decision of this case.

Barnhill and Johnson, J. J., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.

[File endorsement omitted.]

IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

Appeal docketed 7 August, 1951.
Case argued 4 September, 1951.
Opinion filed 31 October, 1951.
Final Judgment entered 31 October, 1951.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full true and perfect copy of the record and proceedings in the above

entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office, in Raleigh, North Carolina, this the 23rd day of January, 1952.

———————, Clerk of the Supreme Court of the State of North Carolina.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 324, Misc.

[Title omitted]

ORDER ALLOWING CERTIORARI—March 31, 1952

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 681.

It is further ordered that the certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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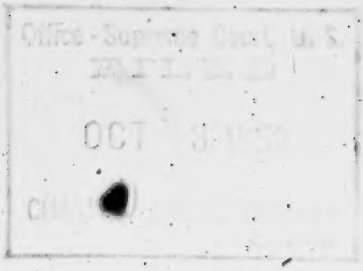

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 34

DAVID BROCK,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent

BRIEF OF DAVID BROCK, PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 34

DAVID BROCK,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF DAVID BROCK, PETITIONER

Question Presented

Was the petitioner placed twice in jeopardy for the same offense, on a charge of felonious secret assault, and, under the circumstances shown in this case, thereby, upon conviction and sentence of imprisonment, deprived of his rights under the Fourteenth Amendment to the United States Constitution, including the right not to be deprived of his liberty without due process?

Preliminary Statement

On March 31, 1952, this Court granted petitioner David Brock's motion for leave to proceed in *forma pauperis* and also his petition for writ of certiorari to have this Court

review a decision of the Supreme Court of North Carolina affirming the judgment of the Superior Court of Edgecombe County, North Carolina, ordering the petitioner imprisoned for a term of two years. That opinion is reported as *State* v. *David Brock*, 234 N. C. 390, 67 S. E. 282.

In its brief in opposition to the granting of the writ of certiorari the State of North Carolina raised procedural objections to the granting of the writ. In view of the action of this Court the petitioner will not devote argument to those objections, but will confine his argument to the merits.

Statement of the Matter Involved

This case presents a serious question relating to the petitioner's constitutional right under the fourteenth amendment of the Federal Constitution not to be placed twice in jeopardy for the same offense under the circumstances herein shown. (1) This case involves two trials, one in 1949 (the basis of a plea of former jeopardy), and one in 1951, from which this appeal comes.

All references below are to the record of the case certified by the Supreme Court of North Carolina. Every fact stated herein was admitted or agreed to by the State of North Carolina:

October 17, 1949, the Edgecombe County Grand Jury indicted defendant on a charge of felonious secret assault (R. pp. 2-3).

Defendant was then placed on trial on said valid indictment, before a court of competent jurisdiction, was properly arraigned, entered a plea of "Not Guilty," a competent jury was properly impaneled and properly sworn to make a true deliverance in the case (R. pp. 4 and 5). The State then offered its evidence and its witnesses against the defendant, offering the testimony of the following State's

witnesses: Alton Hathaway, J. H. Everett, Elmer Matthews, Sheriff Tom Bardin, Jim Cook, and

Alton Hathaway's testimony was to the effect that on the night of September 16, 1949, five shots were fired into a house occupied by Hathaway, his wife, his daughter, J. D. Wyatt and Mrs. J. D. Wyatt; that the shots were from a .22-caliber rifle fired from a passing automobile, and that the shots came close to the occupants of the house (R. pp. 6 and 7).

Sheriff Bardin's testimony was in part cumulative to that of Alton Hathaway, and added that Jim Cook confessed to Bardin that he, with the defendant Brock, with another, rode by Wyatt's house and did the shooting, with the defendant Brock actually handling the gun (R. pp. 7 and 8).

J. H. Everett's testimony was cumulative to part of that of Hathaway and Bardin (R. pp. 12 and 13).

Jim Cook's testimony was brief. He exercised his personal privilege to refuse to testify concerning the alleged shooting on the ground that to do so would incriminate him (R. pp. 13 and 14).

The same is true as to Elmer Matthews (R. pp. 14, 15 and 16).

At the conclusion of all the State's evidence the Solicitor for the State moved that a juror be withdrawn and a mistrial ordered and that the case be continued until a later date (R. p. 4, par. 5, and R. p. 16).

The Solicitor for the State moved upon the theory that the State would at a later date be able to present a stronger case against the defendant David Brock in that State's witnesses Cook and Matthews might at a later date testify differently or to additional facts than at the first trial (R. p. 4, par. 6, and p. 16).

Defendant objected to and resisted the motion (R. p. 4, par. 7, and pp. 16 and 17).

The Court, without cause or proper cause (R. p. 5, par. 8), made the following findings of fact, conclusions and ruling:

(1) The Solicitor for the State tried two cases growing out of the same transaction, *State* v. *Jim Cook*, and *State* v. *Elmer Matthews* (R. p. 16).

(2) The evidence in the said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense (R. p. 16).

(3) That the defendants Jim Cook and Elmer Matthews were convicted at this term of Court on the charge of assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of State v. David Brock (R. p. 16).

(4) That during the course of the trial in the Brock case the Solicitor for the State undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State (R. p. 16.)

(5) Counsel for Cook and Matthews advised them to rely upon their constitutional rights not to give testimony which would incriminate them for that no judgment had been entered in their case and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered (R. p. 16). (Note: In respect to this finding of fact, defendant Brock points out that the record clearly shows (pp. 13, 14 and 15) that it was the State's Witnesses Cook and Matthews themselves, and Not defendant Brock, nor anyone acting on his behalf or representing him, who invoked their Personal right against self-incrimination. It is also a fact that prior to the Solicitor's calling the Brock case for trial, and prior to Brock's arraignment, Cook and Matthews stated to the Solicitor that they would refuse to testify as to the alleged felonious secret assault on the grounds that it would incriminate them, and that the Solicitor elected to put defendant Brock on trial and in jeopardy of conviction and punishment for felonious secret

assault with full and complete knowledge and notice of the foregoing.)

(6) The Court ruled that State's witnesses Cook and Matthews would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court (R. p. 16).

(7) The Court is of the opinion that the ends of justice require that the State have available for it the testimony of Cook and Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court (R. p. 16).

The Court then stated that it "in its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued" (R. p. 17).

Defendant Brock objected to the foregoing findings of fact, conclusions of law and ruling of the Court, and reserved an appropriate exception (R. p. 17), and subsequently availed himself of all rights thereunder upon his second trial in his plea of former jeopardy (R. pp. 13 and 18), in which he raised and relied upon his rights under the Fourteenth Amendment.

About 17 months later, on March 7, 1951, during the regular March 1951 Term of Superior Court of Edgecombe County, the case of *State* v. *David Brock*, on the same indictment for felonious secret assault, was again called for trial (R. pp. 3 and 18).

At the time of his arraignment, and before any other plea, defendant Brock entered his written and sworn plea of former jeopardy, which appears of record (pp. 3 and 18), and which sets forth the facts hereinbefore mentioned, among other things. Reference is made to the plea itself, and the Exhibit A attached thereto and incorporated therein, for the full plea. Every factual allegation thereof is and was admitted by the State of North Carolina.

The Solicitor for the State then announced that he denied that the facts set forth in the plea of former jeopardy were legally sufficient to sustain a plea of former jeopardy (R. p. 18). The Solicitor did not controvert the facts set forth in said plea (R. p. 18), but, for the purposes of this case, admitted them (R. p. 18).

The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain a plea of former jeopardy, and overruled and denied defendant's plea (R. p. 18). By its ruling the trial court overruled petitioner's plea in so far as it was based upon the Fourteenth Amendment.

To the foregoing ruling, defendant entered appropriate objection and reserved appropriate exception (R. p. 18). This was carried forward as defendant's exception No. 1, under assignment of error No. 1 in his appeal to the Supreme Court of North Carolina.

Defendant then moved the Court to permit his plea of former jeopardy to go to a jury, and the facts to be passed upon by a jury (R. p. 18).

The Court denied the motion and defendant entered and reserved appropriate objection and exception (R. p. 18). This is carried forward as defendant's exception No. 2, under assignment of error No. 1 in his appeal to the Supreme Court of North Carolina.

Defendant then, reserving his rights under his plea of former jeopardy, and his exception theretofore set out, pleaded "Not Guilty" (R. p. 19).

At this point, the Solicitor for the State announced in open court that the State would ask for a verdict of guilty of assault with a deadly weapon under the indictment for felonious secret assault (R. p. 19).

A jury was then summoned, selected, impaneled and sworn to try the cause (R. p. 19).

The State presented in evidence testimony substantially the same as that presented in the first trial, with the addition of the testimony of Jim Cook who had previously exercised his right against self incrimination not to testify at the earlier trial. At the time of the second trial Jim Cook was a State prisoner. His testimony, in substance, corroborated the testimony which other State's witnesses had presented in the first trial and which they repeated in the second trial.

The jury returned a verdict as to the defendant of "guilty of assault with a deadly weapon".

Thereafter, the Court entered judgment that defendant Brock should be confined to jail for a period of two years, and assigned to work upon the roads (R. p. 35). Defendant entered and reserved appropriate objection and exception (#54), and appealed. This exception is brought forward under assignment of error No. 8 in his appeal to the Supreme Court of North Carolina.

At the trial in the Superior Court, in his plea of former jeopardy, and on appeal in the Supreme Court of North Carolina the petitioner relied upon and properly preserved his contention that his rights under the Fourteenth Amendment to the Federal Constitution had been violated by twice placing him in jeopardy for the same offense under the circumstances of this case.

Jurisdiction

This Court has jurisdiction under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Sec. 344 (b)), 28 U.S.C. Section 1257 (3).

The Supreme Court of North Carolina filed its opinion and entered final judgment October 31, 1951.

ARGUMENT

The petitioner was twice placed in jeopardy for the same offense, on a charge of felonious secret assault, under such circumstances that his resulting conviction and sentence of imprisonment constitute a deprivation of his right under the Fourteenth Amendment to the United States Constitution not to be deprived of his liberty without due process of law.

In this case it clearly appears, and is agreed by all that petitioner was in 1949 deliberately placed on trial on a felony charge by the State, which had full knowledge of the witnesses and testimony available to it, and was submitted to all the dangers and jeopardy of conviction in a proceeding wherein the State presented against him a case legally sufficient to convict, and that at the conclusion of the State's evidence the State, over petitioner's objection, obtained a mistrial on the sole theory that later the State might present a stronger case because some of its witnesses might later agree to testify to different or additional facts. About seventeen months later, in 1951, the State again placed the petitioner on trial, and did obtain additional testimony against the petitioner from one of its witnesses who had, since the first trial, become a state prisoner as well as a state witness.

Petitioner submits that the procedure utilized to deprive him of his liberty was so arbitrary and so unfair as to violate any reasonable conception of due process.

Whether or not placing a defendant twice in jeopardy for the same offense should be held, *per se*, a denial of due process (see *Corpus Juris Secundum*, Volume 16, in the treatise on "Constitutional Law", Section 582, at page 1117, where it is stated that "Double jeopardy for the same offense is a denial of due process. . . .", citing *Ex parte*

Ulrich, D. C. Mo., 42 F. 587, reversed on other grounds, C.C. 43 F. 661, appeal dismissed 13 S. Ct. 1053, 149 U. S. 789, 37 L. Ed. 937.

See also Section 579, at pages 1171 and 1172, of the same treatise which, citing cases, points out:

> "Due process of law in a criminal case requires a law creating and defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial before an impartial judge or judge and jury, according to established criminal procedure, *and a right to be discharged unless found guilty.*" (Italics added.)

it is perfectly clear from the decisions of this Court on the point that this Court will examine all the circumstances of each case separately to determine whether, in their light, the State's action did "satisfy the necessity for basic fairness which is formulated in that (the Fourteenth) Amendment," quoting Mr. Justice Reed in *Gibbs* v. *Burke*, 337 U. S. 773, 782, 93 L. Ed. 1686.

Hence, under the doctrine of *Palko* v. *Connecticut*, 302 U. S. 319, 329, 82 L. ed. 288, the petitioner submits that he was denied that "basic fairness" required by the Fourteenth Amendment. In the *Palko Case* the question was whether a statute permitting the State to appeal in criminal cases and obtain a new trial because of errors in the first trial, thereby, subjecting a defendant to a second trial was a violation of the Due Process Clause. In an opinion by Mr. Justice Cardozo this Court held the statute did not violate the requirement for basic fairness because:

> "The State is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him (the defendant) shall go on until there shall be a trial free from the corrosion of substantial legal error. . . .

> This is not cruelty at all, nor even vexation in any immoderate degree."

In the instant case there is no claim or hint that there was error prejudicial to the state. Neither was there any emergency or unexpected or surprise development prejudicial to the State. Therefore, the other points made by Mr. Justice Cardozo in the *Palko Case* are most important:

> "What the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider."

The distinction Mr. Justice Cardozo makes from the facts in the *Palko Case* as a probable basis for a different result is exactly the distinction between the facts in this petitioner's case and the facts in the *Palko Case*.

Therefore the petitioner invokes the doctrine enunciated by Mr. Justice Cardozo that this Court will examine the circumstances of this case to determine "On which side of the line the case made out by the appellant has appropriate location. . . . Is it that kind of double jeopardy . . . which . . . has subjected him to hardship so acute and shocking that our polity will not endure it?"

The petitioner submits that Mr. Justice Cardozo then deliberately described a case on all fours with this petitioner's case as an indication of what would be the kind of double jeopardy which violates the requirements of the Due Process Clause.

In a more recent double jeopardy case, *Louisiana* v. *Resweber*, 329 U. S. 459, 481, 91 L. ed. 422, Mr. Justice Reed indicates in an opinion joined in by Mr. Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson, that the *Palko Case* does not foreclose the possibility that the Fourteenth Amendment does prohibit a State from depriving a de-

fendant of his liberty under circumstances which would constitute a violation of the Fifth Amendment. The petitioner does not think an affirmative answer to that question to be necessary to his case, but submits that the answer, as a practical matter, should be in the affirmative because the type of double jeopardy which is held to violate the Fifth Amendment is in reality the type which is, in the words of Mr. Justice Frankfurter, in his concurring opinion, "offensive to a decent respect for the dignity of man, and heedless of his freedom". The following is from Mr. Justice Reed's opinion, wherein it was held that Louisiana's second attempt to execute Willie Francis, after a mechanical failure of the electric chair frustrated the first, was not a deprivation of due process:

> "To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth . . . Amendment(s), as to double jeopardy . . . would be violative of the due process clause of the Fourteenth Amendment. (Citing in footnote No. 2, *Lee Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. Ed. 97, 106, 29 S. Ct. 14; *Palko v. Connecticut*, 302 U. S. 319, 324, 82 L. Ed. 288, 291, 58 S. Ct. 149; *Re Kemmler*, 136 U. S. 436, 445, 34 L. Ed. 519, 523, 10 S. Ct. 930; *Collins v. Johnston*, 237 U. S. 502, 510, 59 L. Ed. 1071, 1079, 35 S. Ct. 649.)

Then, referring to and on the authority of, the *Palko* case, *supra*, Mr. Justice Reed points out that the circumstances of the case do not render the second attempt to execute Willie Francis a violation of the Due Process Clause.

In a concurring opinion, Mr. Justice Frankfurter points out that the rights of a defendant under the Fourteenth Amendment are not necessarily limited to the rights conferred as against the Federal Government in the Fifth

Amendment, but may, indeed, be more extensive if "civilized standards" so demand. Of course, no one would deny that if the Fifth Amendment, or any other, actually embodies a basic right required by "civilized standards", it is of necessity also embodied in the Due Process Clause of the Fourteenth Amendment. The only point of disagreement could be whether a particular right is "basic" in that sense, or, as the petitioner submits, without conceding that it is necessary to his case, that in fact the rights guaranteed by our founding fathers in the original Bill of Rights (particularly the double jeopardy provision of the Fifth Amendment) are all, as they obviously believed, necessary protections against tyranny and therefore "basic" in the same sense. In the end, the possible disagreement may well boil down to a difference in judgment upon specific and varying sets of circumstances in what Mr. Justice Frankfurter terms

> "the gradual and empiric process of 'inclusion and exclusion'" (citing *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616, 619), in his opinion, joined in by the majority of this Court in *Wolf v. Colorado*, 338 U. S. 25, 48, 93 L. Ed. 1782.)

The petitioner submits that in the *Palko* case, *supra*, Mr. Justice Cardozo has correctly indicated that the cause the petitioner brings before this Court falls on the side of the line which is violative of the Due Process Clause. In days closer to personal experience of our own people with the ways of tyranny, the Supreme Court of North Carolina pointed out in apt language why that is so. In *State* v. *Garrigues*, 2 N. C. 241 (1765) that Court wrote:

> ". . . in the reigns of the latter Stuart family, a different rule prevailed, that a jury in such cases might be discharged for the purpose of having better evi-

dence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the Courts of this country. In the time of James II, and since the Revolution, this doctrine came under examination, and the rule laid down by Lord Coke revived.

". . . In the present case the jury were suffered . . . to separate without giving a verdict . . . and perhaps (the defendant) could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured, or some accident may prevent their attendance. We will not again put his life in jeopardy, more especially as it is very improbable we shall be able to possess him of the same advantages.

"So he was discharged."

The foregoing opinion was written many years ago, and in a time in our history when the men who would become the founding fathers were deeply concerned about the rights of individual citizens as against the crown or state, and the danger of tyranny where the individual's rights and liberties were not vigorously upheld by a conscientious judiciary.

The principle therein stated—that for the crown (or state) to work the discharge of a jury for the purpose of having better evidence against a defendant at a latter day "is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the Courts of this country" . . . is equally true today. The petitioner submits that it is the very principle Mr. Justice Cardozo meant to preserve when he distinguished the facts in the *Palko* case, *supra*. Mr. Justice

Reed points out in *Louisiana* v. *Resweber*, 329 U. S. 459, 481, 91 L. Ed. 452, that, "as this is a prosecution under state law, as far as double jeopardy is concerned, the *Palko* case is decisive."

The admonition of Mr. Justice Frankfurter in his dissenting opinion in *On Lee, Petitioner* v. *the United States of America*, No. 543, October Term, 1951, (a case where the use of evidence obtained in violation of the Fourth Amendment was the basis for a claim of denial of due process) is apt in this case:

> "The law of this Court ought not to be open to the just charge of having been dictated by the "odious doctrine", as Mr. Justice Brandeis called it, that the end justified reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard for long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, as was wisely said by Archbishop William Temple, is "The moral qualities which it exhibits in its own conduct."

North Carolina, itself, early recognized in "double jeopardy" cases the truth of what Mr. Justice Frankfurter has said. In the case of *In re Speir*, 12 N. C. 491 (1827) that Court pointed out:

> HALL, J.: "In this case the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be when it is brought before this Court on a collateral question of law. Although, the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose con-

viction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not."

TAYLOR, C. J.: "In the remarkable case of Kenlocks, Foster, 76, . . . a majority of the judges . . . rejected with just animadversion the authority of those cases which had occurred in that period of misrule and persecution preceding the revolution. In one of these the court discharged the jury in a capital case, after evidence given on the part of the Crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial, when the Crown should be better prepared . . . .

"These stains upon the administration of justice show to what extremes, in a state of civil discord, the passions of men urge them to trample upon the most salutary principles of law, and in what degree judges holding their office at the will of the sovereign, were eager to pander to his appetite for blood and forfeitures . . .

"As the common law of the State already protects the accused against a second trial, not only in crimes of all descriptions, but in questions of civil right, it is to be inferred that the Constitutions (State and Federal) meant much more, and that their design was to protect the accused against a trial where the first jury had been discharged without due cause."

This petitioner requests that this Court "apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." See opinion by Mr. Justice Frankfurter in *Watts* v. *Indiana*, 338 U. S. 49, 62, 93 L. Ed. 1801, wherein it was held that use of a confession wrung from a defendant violated the Due Process Clause.

Conclusion

For the reasons set forth above the judgment below against this defendant should be reversed.

Respectfully submitted,

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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

~~681~~ 34

No. ~~324, Misc.~~

DAVID BROCK,
PETITIONER,

VS.

THE STATE OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

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North Carolina, *Respondent.*

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

No. 324, MISC.

DAVID BROCK,
PETITIONER,

VS.

THE STATE OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

The petitioner, David Brock, seeks, by writ of *certiorari*, to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming the judgment of the Superior Court of Edgecombe County, North Carolina, imposing sentence upon the petitioner for a conviction of the crime of assault with a deadly weapon. The opinion of the Supreme Court of North Carolina, filed October 31, 1951, is reported as STATE v. DAVID BROCK, 234 N. C. 390, 67 S.E. (2d) 282—Adv. Op. No. 3, November 29, 1951. (See Appendix, p. 13, where opinion of Supreme Court of North Carolina is set out in full.)

FACTS

At the regular term of the Superior Court of Edgecombe County held on October 17, 1949, the grand jury returned a true bill against the petitioner, David Brock, charging him with a secret assault with a deadly weapon with intent to kill. The petitioner was placed on trial, and the State proceeded with its case. During the progress of the trial and at the request of the Solicitor, the trial judge withdrew a juror and declared a mistrial. The trial judge made certain findings of fact which show that the Court was of the opinion that "the ends of justice require that this case not be completed and that a mistrial be ordered." (R. pp. 16, 17.)

The petitioner was then tried at the March Term, 1951 of the Superior Court, and when his case was called, he entered a plea of former jeopardy. (R. pp. 3 to 18.) The trial judge ruled that the facts set forth in the plea, taken to be true, are insufficient to sustain the plea and overruled and denied the same. (R. p. 18.) The Solicitor then announced that he would not ask for a verdict of guilty of secret assault but would ask for a verdict of guilty of assault with a deadly weapon. (R. p. 19.) The petitioner entered a plea of not guilty, and the trial was had.

The State introduced Alton Hathaway, who testified that on September 16, 1949, he and his wife spent the night at J. D. Wyatt's home, which is located four miles out on the Wilson Highway, west of Tarboro, North Carolina. (R. p. 19.)

For some time prior to this date, a strike had been in progress at the Hart Cotton Mills in said town. The petitioner in this case, along with the witness Hathaway and others, were on strike. J. D. Wyatt was a watchman at the plant and was not on strike.

Early on Wednesday morning, prior to the alleged assault on the following Friday, J. D. Wyatt went to the mill to go to work. As he approached the gate, he was met by Jim Cook and a number of strikers, who blocked his entrance to the mill. Cook told Wyatt that if he went into the mill the undertaker would have a job.

On the evening of Friday, the 16th, at about seven o'clock, the witness Hathaway returned from a picket tent in Tarboro to the home of his father-in-law, J. D. Wyatt. Hathaway testified that while at the tent he saw the petitioner Brock, Jim Cook and A. Q. Blackmon. (R. p. 21.) At about 9:30 that night, his wife fed the baby, and they went to bed. Shortly after the Hathaways had retired, he heard a car slow down as it passed his house. In a minute or so, the car came back. As it passed the house, he heard five rifle shots in quick succession. Four shots came through the window of the room in which Hathaway and his family were sleeping. (R. p. 20.) One bullet lodged within five feet of the bed, another bullet passed within 36 inches of their baby, another bullet passed on through the room and into the room occupied by Mr. Wyatt.

Mr. Wyatt and Mr. Hathaway went to the police station in Tarboro and reported the shooting. On the way back to Mr. Wyatt's house, they saw petitioner Brock's car going "on the same street that goes by J. D. Wyatt's house." (R. p. 21.) Later that night, petitioner Brock was taken to jail, and in the presence of the sheriff and other witnesses, and in the presence of one Matthews, Jim Cook made the statement that it was his rifle that was used in the shooting and that petitioner Brock actually did the shooting. Witness Cook stated to the sheriff, in the presence of petitioner Brock, that Brock helped plan the assault and that Brock "done the shooting." (R. p. 28.) Sheriff Bardin stated that after Cook made this statement, one Matthews agreed that it was correct, and petitioner Brock said, "I have nothing to say." (R. p. 32.)

It appears from the evidence that the petitioner Brock, as well as Wyatt, Hathaway, Matthews, Cook and others, were all out on a strike, but there was a difference of opinion among the strikers as to how the strike should be handled, and the petitioner Brock and the witness Wyatt, whose home was fired into, belonged to opposing factions of the employees out on strike.

ARGUMENT

I.

THE DENIAL OF PETITIONER'S PLEA OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L. ed. 314
BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L. ed. 768
PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C.C.A. 9)
FOX v. OHIO, 5 How. 434, 12 L. ed. 410, 434

The petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Compare:

U. S. v. RAGEN, (1950; C.C.A. 7), 181 Fed. (2d) 1001
AMRINE v. TINES, (1942; C.C.A. 10), 131 Fed. (2d) 827
PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288
MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597

In U. S. v. RAGEN, *supra*, it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '***.'

But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.

* * * * * * * *

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra,* it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court, the petitioner's plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioner was not twice

placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a State Court with respect to a question arising under the Constitution of the State. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304, 62 L. ed. 304
DAVIS v. OHIO, 241 U. S. 565, 60 L. ed. 1172
GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917

II.

THE DECISIONS CITED BY PETITIONER DO NOT SUPPORT HIS POSITION ON THE CONSTITUTIONAL QUESTION HE IS ATTEMPTING TO PRESENT IN THIS APPLICATION.

The petitioner cites and relies upon PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, and the petitioner in his brief (p. 22) states, with reference to the PALKO case: "Justice Cardozo states that the Fourteenth Amendment to the U. S. Constitution brings along, and makes applicable to states, the protections of the Fifth Amendment." It is quite apparent that the petitioner has misconceived the true holding of the Court in the PALKO case. A State statute permitted the State to appeal in a criminal case when such appeal was authorized by the trial judge, for correction of errors of law. The petitioner in the PALKO case had been convicted of murder in the second degree and sentenced to life imprisonment. On a State appeal, this was reversed, and upon retrial, the petitioner was convicted of murder in the first degree and sentenced to death. Palko contended that the second trial placed him twice in jeopardy for the same offense and, therefore, violated the Fourteenth Amendment. Palko contended that the prohibitions of the Fifth Amendment, for that matter he contended that all of the original bill of rights (Amendments I to VIII) had now been incorporated into the Fourteenth Amendment, and, therefore, the prohibitions

of the first eight Amendments by force of the Fourteenth Amendment made these same prohibitions applicable to the States. Actually Justice Cardozo said: "There is no such general rule." It was held in this case that Palko's second trial was consistent with due process of the law under the Fourteenth Amendment, and even if the situation presented in PALKO'S case might have been forbidden under the Fifth Amendment on the theory of double jeopardy, assuming a Federal trial was involved, the same rule would not apply to the States. After reviewing the various cases and pointing out certain prohibitions in the bill of rights that had been construed as being contained in the Fourteenth Amendment and certain other prohibitions in the bill of rights that had been construed as not being incorporated in the Fourteenth Amendment, Justice Cardozo said:

> "On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? Hebert v. Louisiana, supra. *The answer surely must be 'no'.*" (Emphasis supplied.)

The case of KEPNER v. U. S., 195 U. S. 100, 49 L. ed. 114 involved the application of a constitutional immunity provision of the Federal Constitution to the Philippine Islands. The case involved a construction of an act of the Congress and has no application to the Fourteenth Amendment as applied to the States. Mr. Justice Cardozo, on p. 322 of the opinion in the official report of the PALKO case, says that it was a Federal prosecution.

The petitioner cites certain Federal cases as follows: BERKOWITZ v. U. S., 93 F. 452; JARL v. U. S., 19 Fed. (2d) 891; U. S. v. WATSON, Fed. Cas. No. 16, 651; CARNERO v. U. S., 48 Fed. (2d) 69; EX PARTE ULRICH, 42 F. 587; U. S. v. KRAUT, 2 Fed. Supp. 16 and HUNTER v. WADE, 169 Fed. (2d) 973. We think it is sufficient to say that these were all cases that arose on Federal indictments

originally instituted in the Federal Courts, and in most instances involved constructions of the Fifth Amendment as applied to Federal cases and Federal rules. These cases do not constitute any authority whatsoever in considering indictments and convictions in State Courts where such convictions are attacked under the Fourteenth Amendment.

III.

THE SUPREME COURT OF NORTH CAROLINA DISPOSED OF THIS CASE ACCORDING TO THE RULES OF FORMER JEOPARDY PREVAILING IN THE STATE JURISDICTION.

In the opinion of the Supreme Court of North Carolina in this case (App. p. 13), the Court stated: "This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533." Mr. Justice Valentine took no part in the decision of the case, having been appointed to Associate Justice in September, 1951. The Chief Justice and the Associate Justices being evenly divided as to the competency of certain evidence, the judgment below was affirmed without becoming a precedent under the procedural rules of the Supreme Court of North Carolina.

In North Carolina, the trial Court has a right to withdraw a juror and declare a mistrial in both felonies and misdemeanors, the only difference being that in capital felonies, the necessity for the discharge is subject to review. In misdemeanor cases, the exercise of this power is entirely discretionary and is not subject to review by the Supreme Court. The petitioner in this case was convicted of a misdemeanor, but if it is said that the bill under which he was tried originally charged a felony, it was not a capital felony and is still subject to the same rule. In the case of STATE v. GUICE, 201 N. C. 761, 161 S.E. 533, the defendant was indicted for a felonious assault, inflicting serious injury not resulting in death and with intent to kill and murder his victim. This is a felony. The State

introduced evidence and rested its case, and counsel for the defendant made a motion for judgment as of nonsuit. Before ruling on the motion, the Court withdrew a juror and ordered a mistrial, and the authority of the Court to take this course of action was the question presented on appeal. The Supreme Court of North Carolina, in disposing of the matter, said:

> "In misdemeanors, and all cases of felonies not capital, the court below has the discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable. In capital felonies the facts must be found and the necessity for such discharge is subject to review. *S. v. Bass,* 82 N. C., 570; *S. v. Andrews,* 166 N. C., 349; *S. v. Ellis,* 200 N. C., 77.
>
> "In the *Bass case, supra* (a felony), at p. 574-5, speaking to the subject, the Court said: 'We hold therefore on a review of the cases in our reports, that his Honor had the discretion to dissolve the jury and hold the defendants for a new jury, and that the security for the proper exercise of his discretion rests not on the power of this Court to review and reverse the judge, but on his responsibility under his oath of office.'"

In the case of STATE v. DOVE, 222 N. C. 162, 22 S.E. (2d) 231, the Supreme Court of North Carolina, on the same question, said:

> "The defendant was indicted for murder. However, at the solicitor's election he was not put on trial for first degree murder but for murder in the second degree or manslaughter. This was equivalent to taking a *nolle prosequi* on the capital charge. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387. At the close of the State's evidence defendant's motion for judgment as of nonsuit was denied. The solicitor then moved to be permitted to offer additional testimony. This motion was allowed, and, it appearing that the evidence desired was not presently available, the court ordered a mistrial, and continued the case. The defendant excepted to the ruling of the trial judge, and appealed to this Court.

"The ordering of a mistrial in a case less than capital is a matter in the discretion of the court. *S. v. Johnson*, 75 N. C., 123; *S. v. Upton*, 170 N. C., 769, 87 S. E., 328; *S. v. Ellis*, 200 N. C., 77, 156 S. E. 157; *S. v. Guice*, 201 N. C., 761, 161 S. E., 533; *S. v. Watson*, 209 N. C., 229, 183 S. E., 286. In capital cases only is the judge required to find the facts and place them on record so that upon a plea of former jeopardy the action of the court may be reviewed. *S. v. Tyson*, 138 N. C., 627, 50 S. E., 456; *S. v. Beal*, 199 N. C., 278 (295), 154 S. E. 604."

It is clear, therefore, that so far as State practice is concerned, the petitioner has no legal authority to support his position.

We also believe that the decisions of this Court sustain our view as to this feature of the law. See WADE v. HUNTER, 336 U. S. 684, 93 L. ed. 974; THOMPSON v. U. S., 155 U. S. 271, 39 L. ed. 146; SIMMONS v. U. S., 142 U. S. 148, 35 L. ed. 968.

IV.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO PROPERLY SET UP AND HAVE PASSED UPON BY THE LOWER COURTS A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES.

We have tried to show that the question or point relied on in the petition for writ of *certiorari* is not a Federal question of sufficient substance and importance to justify the issuance of a writ of *certiorari*. We now contend that this Court is without jurisdiction to allow the petition and grant the writ of *certiorari* because the petitioner did not properly set up and assign as error in the State Courts the constitutional question now presented.

While it is true that in his written motion, as shown on R. p. 5, that the petitioner alleged that his second trial would place him in jeopardy and violation of the Constitution of North Carolina and in violation of the Fifth

Amendment and Fourteenth Amendment of the Constitution of the United States, yet a careful examination of the record will show that the petitioner never did assert any rights on a constitutional basis. On R. p. 18, it will be seen how the plea of former jeopardy was disposed of in the trial Court. The prosecuting officer entered a general denial that the facts stated were sufficient to constitute former jeopardy. The Court ruled "that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same." The petitioner then merely entered an objection and reserved an exception. The petitioner then moved the Court to permit his plea of former jeopardy to be presented to and the facts to be passed on by the jury. This was overruled, and the petitioner excepted. On R. p. 19, the petitioner states his exception as follows: "The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes the defendant's Exception No. 1." The petitioner again stated his exception as follows: "The foregoing exception to the Court's denial of the motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's Exception No. 2."

It will thus be seen that the petitioner nowhere urged the trial Court to pass upon any constitutional issue or question. When the petitioner assigned his errors in the record (R. p. 36) to be passed upon by the Supreme Court of North Carolina on this point, he assigned them as follows:

"GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

"ASSIGNMENT OF ERROR 1. The defendant assigns as error the Trial Court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of fact, as shown by EXCEPTIONS 1 and 2 (R p 19)."

It will thus be seen that the Supreme Court of North Carolina was never requested or called upon to pass on

this question of former jeopardy in relation to the Fourteenth Amendment of the Federal Constitution.

Under the statute authorizing review by *certiorari* of decisions of the highest Courts of the several States, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U.S.C.A., § 1257

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722

CONCLUSION

The questions set out in the petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were properly set up in the State Courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
Attorney General,

RALPH MOODY,
Assistant Attorney General,

Counsel for the State of
North Carolina, *Respondent.*

APPENDIX

STATE v. DAVID BROCK

(Filed 31 October, 1951)

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, 16 September, 1949 (G. S. 14-31.)

There was verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for defendant, appellant.

DEVIN, C. J. This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove,* 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice,* 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

VALENTINE, J., took no part in the consideration or decision of this case.

BARNHILL and JOHNSON, JJ., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 34, ~~Misc.~~.

DAVID BROCK,
PETITIONER,
vs.
THE STATE OF NORTH CAROLINA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA.

HARRY McMULLAN,
Attorney General
of North Carolina

RALPH MOODY,
Assistant Attorney General,
of North Carolina,
Counsel for Respondent

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA.

BRIEF OF THE RESPONDENT,
STATE OF NORTH CAROLINA.

OPINION BELOW

The opinion of the Supreme Court of North Carolina filed on October 31, 1951, is reported at 234 N. C. 390, 67 S.E. (2d) 282, subnom. STATE v. DAVID BROCK (see Appendix, p. 17, where opinion of Supreme Court of North Carolina in this case is set out in full).

This Court granted certiorari on March 31, 1952, the record in this case in this Court being DAVID BROCK v. NORTH CAROLINA, No. 324, Misc., Oct. Term, 1951. The case was then given No. 681, Oct. Term, 1951.

QUESTIONS PRESENTED

1. The question is presented as to whether or not the petitioner in this cause has properly raised or set up and whether or not the trial court and the Supreme Court of North Carolina have passed upon or decided any claim of the infringement of any rights, privileges or immunities of the petitioner guaranteed under or protected by the Constitution of the United States.

2. The question is presented as to whether or not the right of the petitioner to be protected from successive prosecutions for the same offense in a State Court is guaranteed by the due process clause of the Fourteenth Amendment. The same question is raised by the petitioner's contention that the jeopardy provision of the Fifth Amendment is in principle incorporated in the Fourteenth Amendment.

3. The point is raised as to whether or not the adjudication of the Supreme Court of North Carolina as to what constitutes former jeopardy under the laws of that State is a final adjudication of the existence or nonexistence of such jeopardy.

4. Assuming that so-called double jeopardy or former jeopardy or exposure to excessive prosecutions for the same offense in a State Court is prohibited by the Fourteenth Amendment, does such former jeopardy, double jeopardy or exposure to excessive prosecutions for the same offense exist under the facts in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

STATEMENT AND HISTORY OF THE CASE

At the regular term of the Superior Court of Edgecombe County held on October 17, 1949, the grand jury returned a true bill against the petitioner, David Brock, charging him with a secret assault with a deadly weapon with intent to kill. The petitioner was placed on trial, and the State proceeded with its case. During the progress of the trial and at the request of the Solicitor, the trial judge withdrew a juror and declared a mistrial. The trial judge made certain findings of fact which show that the Court was of the opinion that "the ends of justice require that this case not be completed and that a mistrial be ordered." (R. 16,17)

The petitioner was then tried at the March Term, 1951, of the Superior Court, and when his case was called, he entered a plea of former jeopardy (R. 3 to 18). The trial judge ruled that the facts set forth in the plea, taken to be true, were insufficient to sustain the plea and overruled and denied the same (R. 18). The Solicitor then announced that he would not ask for a verdict of guilty of secret assault but would ask for a verdict of guilty of assault with a deadly weapon (R. 19). The petitioner entered a plea of not guilty, and the trial was had.

The State introduced Alton Hathaway, who testified that on September 16, 1949, he and his wife spent the night at J. D. Wyatt's home, which is located four miles out on the Wilson Highway, west of Tarboro, North Carolina (R. 19).

For some time prior to this date, a strike had been in progress at the Hart Cotton Mills in said town. The petitioner in this case, along with the witness Hathaway and others, were on strike. J. D. Wyatt was a watchman at the plant and was not on strike.

Early on Wednesday morning, prior to the alleged assault on the following Friday, J. D. Wyatt went to the mill to go to work. As he approached the gate, he was met by Jim Cook

and a number of strikers, who blocked his entrance to the mill. Cook told Wyatt that if he went into the mill the undertaker would have a job.

On the evening of Friday, the 16th, at about seven o'clock, the witness Hathaway returned from a picket tent in Tarboro to the home of his father-in-law, J. D. Wyatt. Hathaway testified that while at the tent he saw the petitioner Brock, Jim Cook and A. Q. Blackmon (R. 21). At about 9:30 that night, his wife fed the baby, and they went to bed. Shortly after the Hathaways had retired, he heard a car slow down as it passed his house. In a minute or so, the car came back. As it passed the house, he heard five rifle shots in quick succession. Four shots came through the window of the room in which Hathaway and his family were sleeping (R. 20). One bullet lodged within five feet of the bed, another bullet passed within 36 inches of their baby, another bullet passed on through the room and into the room occupied by Mr. Wyatt.

Mr. Wyatt and Mr. Hathaway went to the police station in Tarboro and reported the shooting. On the way back to Mr. Wyatt's house, they saw petitioner Brock's car going "on the same street that goes by J. D. Wyatt's house." (R. 21) Later that night, petitioner Brock was taken to jail, and in the presence of the sheriff and other witnesses, and in the presence of one Matthews, Jim Cook made the statement that it was his rifle that was used in the shooting and that petitioner Brock actually did the shooting. Witness Cook stated to the sheriff, in the presence of petitioner Brock, that Brock helped plan the assault and that Brock "done the shooting" (R. 28). Sheriff Bardin stated that after Cook made this statement, one Matthews agreed that it was correct, and petitioner Brock said, "I have nothing to say." (R. 32)

When Brock was put on trial the first time in 1949, one Jim Cook, who was present in the automobile at the time Brock shot into the house of the prosecuting witness, was used by the State as a witness against Brock. Cook had been convicted already for his part in the affair, but he refused to answer on the advice of his counsel because he intended to appeal to the Supreme Court of North Carolina, and the trial judge ruled that he did not have to answer the State's

questions (see R. 13, 14). The same thing took place as to Elmer Matthews, a witness that the State proposed to use against Brock. Matthews had been convicted of his part in this affair, but he intended to appeal to the Supreme Court of the State, and upon advice of counsel refused to answer questions propounded by the State, and the trial court ruled that he did not have to answer such questions (see R. 14, 15, 16). It was because of this situation and because the trial judge was of the opinion that the State should eventually be allowed to have this evidence after the cases of Cook and Matthews were settled and finally adjudicated and the trial judge also being of the opinion that the ends of justice required the State to have the testimony of these witnesses, that he withdrew a juror, in his discretion, and declared a mistrial (R. 16, 17). At the March Term, 1951, of the Superior Court of Edgecombe County, petitioner Brock was again put upon trial, and the cases of Matthews and Cook having been finally adjudicated by the Supreme Court of North Carolina, Cook was then used as a witness against David Brock (evidence of Cook: R. 25). Upon all of the evidence produced, Brock was convicted and given a sentence of two years, to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission.

It appears from the evidence that the petitioner Brock, as well as Wyatt, Hathaway, Matthews, Cook and others, were all out on a strike, but there was a difference of opinion among the strikers as to how the strike should be handled, and the petitioner Brock and the witness Wyatt, whose home was fired into, belonged to opposing factions of the employees out on strike. There is no evidence that Cook and Matthews stated prior to the trial that they would claim their privilege.

I.

THE PETITIONER HAS NOT PRESENTED NOR HAS THE SUPREME COURT OF NORTH CAROLINA PASSED UPON ANY QUESTION INVOLVING THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF THE STATE OF NORTH CAROLINA.

The respondent, State of North Carolina, still insists, just as it insisted in its brief opposing petition for writ of certiorari,

that the petitioner has not properly raised any constitutional question involving an infringement of the Federal Constitution or, for that matter, any infringement of the State Constitution. The petitioner's pleadings as to violation of constitutional rights will be found on R. 5, paragraphs 10 and 11 of the plea of former jeopardy. These are set forth in the form of legal conclusions, and assuming for the sake of argument that the pleadings are sufficient to raise the constitutional questions desired, we still say that it is the duty of the petitioner to request and see to it that the trial court either passes on these constitutional questions or refuses to pass upon these precise constitutional questions. A reference to the proceedings before the trial court when the plea of former jeopardy was ruled upon will plainly show that no constitutional question was considered at all.[1] It is clear that the court merely passed on the sufficiency of facts to constitute the existence or nonexistence of former jeopardy, assuming the truth of the facts, and not whether any constitutional provision had been violated. The Supreme Court of North Carolina evidently considered the question from this stand-

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[1] "PROCEEDING AND RULING ON PLEA OF FORMER JEOPARDY

"At the time of the arraignment, and before any other plea, the defendant David Brock entered the written and sworn plea of former jeopardy which is filed and appears on record. The Solicitor announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy.

"The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same.

"To the said ruling, defendant David Brock in apt time and manner objected and reserved an exception.

"Defendant David Brock then moved the Court to permit his plea of former jeopardy to go to the jury, and the facts to be passed on by the jury.

"The Court denied the motion. The defendant David Brock objected to said ruling in apt time and reserved an exception.

"This 7th day of March, 1951.

W. C. HARRIS
Judge Presiding

"The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes defendant's
EXCEPTION NO. 1.

"The foregoing exception to the Court's denial of his motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's
EXCEPTION NO. 2."

point only because the possible effect of any constitutional provision was not mentioned by the court.[2]

It is quite evident that the petitioner himself did not consider that any constitutional question had been passed upon because when he assigned his errors in the Supreme Court of North Carolina (R. 36), he simply stated:

> "The defendant assigns as error the trial court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of facts, as shown by Exceptions 1 and 2 (R. 19)."

A reference to the proceedings before the trial court simply shows that the Solicitor or prosecuting officer: "announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy." Under the North Carolina law, where the decision is made on the facts alone, there being no controversy as to the existence of the facts, there is no issue for the jury, and the question of whether jeopardy exists or not is a ruling for the court (STATE v. LEONARD, 236 N. C. 126—Adv. Sheet No. 1—Issued September 5, 1952).

We think it is fundamental that the constitutional rights, privileges or immunities asserted must not only be set up in the State Court but must be denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722
KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299

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[2] The Court said in its opinion: "DEVIN, C. J: This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent."

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Whether or not a question is properly presented to a State Court for decision should be determined by applying State laws and rules of Court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U. S. 177, 28 L. ed. 680

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U. S. 324, 52 L. ed. 1080

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692

JOHN v. PAULLIN, 231 U. S. 583, 58 L. ed. 381

II.

THE PETITIONER PRESENTS NO QUESTION UNDER THE FIFTH AMENDMENT, AND THE DUE PROCESS AND PRIVILEGES AND IMMUNITIES OF THE FOURTEENTH AMENDMENT DO NOT GUARANTEE TO PETITIONER THE RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE IN A STATE COURT.

We do not think that we are required to take up any time on the question of whether or not there has been any infringement of constitutional rights of the petitioner in a State trial that are protected by the Fifth Amendment. It has been so

many times held by this Court that the first eight Amendments are directed to Federal actions or that they are limits upon action by the Federal Government and do not apply to action by the States.[3]

It seems to us that the basic question, without any consideration, is whether or not petitioner has been deprived of any basic right forbidden by the Fourteenth Amendment. Has the petitioner been deprived of any right in such a manner as to violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The descriptive language of the fundamental rights protected varies in different cases decided by this Court. In PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, Mr. Justice Cardozo seemed to make a distinction as to various types or kinds of double jeopardy, and he thought that the one forbidden would be a form which subjected a petitioner to "a hardship so acute and shocking that our polity will not endure it." In the same case, such fundamental rights are related to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (BROWN v. MISSISSIPPI, 297 U. S. 278, 80 L. ed. 682) It is also said that these are rights, the deprivation of which "offend those canons of decency and fairness which express the notions of justice of English-speaking people even towards those charged with the most heinous offenses." (MALINSKY v. NEW YORK, 324 U. S. 401, 89 L. ed. 1039; RACHIN v. CALIFORNIA, L. ed Advanced Opinions Volume 96—No. 5, p. 154) It is also said that this process "requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims." (RACHIN v. CALIFORNIA, *supra*) We are again told that "due process is not a mechanical instrument. It is

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[3] BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L.ed. 314
BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L.ed. 768
PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C.C.A. 9)
FOX v. OHIO, 5 How. 434, 12 L.ed. 410, 434
TWINING v. NEW JERSEY, 211 U. S. 78, 53 L.ed. 97
ADAMSON v. CALIFORNIA, 332 U. S. 46, 91 L.ed. 1903

not a yardstick. It is a process. * * * A requirement of fair play *** A balance of hurt complained of and good accomplished." (JOINT ANTI-FASCIST COMMITTEE v. McGRATH, 341 U. S. 163, 95 L.ed. 849)

In PALKO v. CONNECTICUT, *supra*, Mr. Justice Cardozo pointed out that in the first eight Amendments, there were many provisions directed against specific situations which were not contained in the due process clause of the Fourteenth Amendment. He called attention to the instances where prosecutions by indictment had been dispensed with by States although required by the Fifth Amendment; he called attention to the fact that in State prosecutions, the exemption as to being a witness against one's self would fail if the State elected to end it; he further cited the requirement of a jury trial by the Sixth Amendment, whereas a State can abolish the jury altogether. He then called attention to certain principles described in the First Amendment which although directed to the Federal Government, yet the principles described were so basic that they were implicit in the Fourteenth Amendment. The discussion of Mr. Justice Cardozo wherein he divided what was then considered to be basic rights implicit in the Fourteenth Amendment and also described in the first eight Amendments and drew a distinction between those rights described in the first eight Amendments, which were not so valid and basic that they were necessarily included in the Fourteenth Amendment, has been elaborated and explained further in the case of ADAMSON v. CALIFORNIA, 332 U. S. 46, 91 L.ed. 1903.

We do not see how it can be said, therefore, that the facts in this case could possibly be considered as violating any of these criteria, assuming that there are degrees of errors in State Court proceedings and assuming that under the PALKO case, there is an implication that there may be kinds of double jeopardy or gradations of double jeopardy, how can it be said under these facts that any basic or fundamental right has been violated. This petitioner was put upon trial before a jury. Two of his confederates had previously been convicted and had entered appeals to the Supreme Court of North Carolina. The State had to use the evidence of petitioner's confederates. When these two men were placed upon the

witness stand by the State, apparently under the advice of counsel, they refused to answer questions, saying that they had appealed to the Supreme Court of North Carolina and that, therefore, their own prosecutions might again be heard in a trial court. The trial judge refused to compel these witnesses to answer. The prosecuting officer for the State then asked that a juror be withdrawn and a mistrial declared because it was highly essential that he have the evidence of these witnesses. A mistrial was declared in the discretion of the court, the court finding as a fact that it was essential and necessary and that the ends of justice required that the State have this evidence available. This was all done in the discretion of the court and was warranted by all of the precedents and cases decided by the Supreme Court of North Carolina. No verdict of any jury in this proceeding was had against the petitioner. After the two witnesses, Cook and Matthews, had appealed their case to the Supreme Court of North Carolina and their convictions had been affirmed, and after this Court had denied their application for certiorari (see No. 57, Misc., *Elmer Matthews and Jim Cook, Petitioners v. State of North Carolina,* Respondent—October Term, 1950), the petitioner was then put on trial, and the witness Cook testified that he was with petitioner Brock when he fired into the house of the prosecuting witness with a rifle. This procedure is certainly nothing that shocks the conscience or violates the traditions of English-speaking people or does it violate any of the criteria which we have described above which have been used as partially descriptive of the legal process which we call due process of law (MAXWELL v. DOW, 176 U. S. 581, 44 L.ed. 597).

The Circuit Courts of Appeals of the United States who have passed on the question decidedly agree with our position in this matter.

U. S. v. RAGEN, (1950; C.C.A. 7), 184 Fed.(2d) 1001
AMRINE v. TINES, (1942; C.C.A. 10), 131 Fed. (2d) 827

In U. S. v. RAGEN, *supra*, it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived

is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '* * *.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.

* * * * * * * * * *

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendents 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra*, it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendent to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

III.

THE QUESTION OF FORMER JEOPARDY WAS PASSED UPON BY THE SUPREME COURT OF NORTH CAROLINA, AND THIS STATE ADJUDICATION SHOULD BE FINAL.

We contend that the Supreme Court of North Carolina decided this question according to its own precedents which go back for many years, and, therefore, its decision that jeopardy did not exist under an admitted state of facts should be final. The due process clause, it has been said, does not operate to enforce upon the States a uniform code of criminal procedure, and it has also been said in substance that a State can choose its own methods and practices by which crime is brought to book so long as fundamental fair play is observed (THOMAS v. IOWA, 209 U. S. 258, 52 L.ed. 787; CARTER v. ILLINOIS, 329 U. S. 173, 91 L.ed. 172). It has also been held by this Court that, assuming a party is fully heard in a regular course of judicial proceedings, a trial without error is not guaranteed by the due process clause and that an erroneous decision of a State Court is not a denial of due process.

BONNER v. GORMAN, 213 U. S. 86, 53 L.ed. 709
AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L.ed. 639
WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U. S. 63, 79 L.ed. 761

It is certainly the rule in North Carolina that the ordering of a mistrial in a case less than capital is a matter in the discretion of the court and that in capital cases only is the judge required to find the facts and place them on record so that upon a plea of former jeopardy, the action of the court may be reviewed.[4] It will thus be seen that North Carolina has, for

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[4] Among many cases decided by the Supreme Court of North Carolina, see:
STATE v. DOVE, 222 N. C. 162, 22 S.E. (2d) 231
STATE v. GUICE, 201 N. C. 761, 161 S.E. 533
STATE v. WATSON, 209 N. C. 229, 183 S.E. 286
STATE v. ELLIS, 200 N. C. 77, 156 S. E. 157
STATE v. UPTON, 170 N. C. 769, 87 S. E. 328
STATE v. JOHNSON, 75 N. C. 123
STATE v. TYSON, 138 N. C. 627, 50 S. E. 456
STATE v. BEAL, 199 N. C. 278, 295, 154 S. E. 604
STATE v. ANDREWS, 166 N. C. 349
STATE v. BASS, 82 N. C. 570

many years, followed a rule of discretion and has to this extent relaxed the common-law concept of jeopardy. We in this State have not thought that all of the immunities and privileges and that the whole theory of fair play and authority should be weighed at all times in favor of those charged with criminal offenses. We have thought that the concept of equality includes the State also.

IV.

ASSUMING THAT THIS COURT HOLDS THAT FORMER JEOPARDY IN STATE TRIALS IS FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND ASSUMING THAT THIS COURT WILL DETERMINE BY ITS OWN INVESTIGATION AS TO WHETHER SUCH FORMER JEOPARDY EXISTS OR NOT, THEN UNDER THE RULES OF THIS COURT IN FEDERAL CASES, PETITIONER HAS NOT BEEN EXPOSED TO ANY FORMER JEOPARDY.

In arguing this last point, we are assuming that generally the right of a petitioner to be protected from former jeopardy or so-called double jeopardy is a right within the purview of the due process clause of the Fourteenth Amendment, and assuming also that we do not have before us the sometime perplexing question as to whether or not a petitioner is actually being tried the second time upon substantially the same indictment and with substantially the same evidence, we think that this Court has shown that even under the Federal rules as to when a mistrial will constitute former jeopardy, the petitioner is not entitled to any relief under the facts in this case. It is certainly one thing to say that if a State attempted to actually try a petitioner twice for the same offense and punish him twice for the same offense, former jeopardy or double jeopardy exists as protected by the due process clause; but it is certainly another thing to say or decide when a mistrial or a discontinuance brought about for some reason not foreseen when the trial commenced would amount to such double jeopardy or former jeopardy. In WADE v. HUNTER, WARDEN, 336 U. S. 684, 93 L.ed. 974, this Court had before it a question of double jeopardy arising under the

Fifth Amendment. Two soldiers were placed on trial before a court martial on charges of rape. There was a discontinuance because civilian witnesses were not then available. The case was then transferred from the Third Army to the Fifteenth Army for a new trial since it was impractical for the Third Army to conduct the court martial. This Court ruled in substance that the Fifth Amendment did not mean that every time a defendant was put to trial before a competent tribunal, he was entitled to go free if the trial failed to end in a final judgment. This Court in the WADE case was urged to apply the so-called "imperious" or "urgent necessity" rule which had heretofore been applied in the Circuit Courts of Appeals (CORNERO v. UNITED STATES, 48 F.(2d) 69). This Court, however, rejected such a rule and preferred to follow the rule established in U. S. v. PEREZ, 9 Wheat. 579, and in applying this rule, this Court said:

> "When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in *United States v. Perez*, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:
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> "'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which

the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'"

We think, therefore, that the State of North Carolina, under any rule having in mind the ends of justice, had a right to have a mistrial declared in this case so that the State could have available the evidence of one or both of these witnesses. It could not be foreseen that they would claim their privilege or immunity from testifying at the time petitioner was first put on trial. We ask this Court, therefore, in this case to adopt the concept expressed by Mr. Justice Cardozo in SNYDER v. MASSACHUSETTS, 291 U. S. 97, 78 L.ed. 674, where he said: "The concept of fairness must not be strained until it is narrowed to a filament. * * * There is danger that the criminal law will be brought into contempt—that discredit will even touch great immunities assured by the Fourteenth Amendment — if gossemer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We submit, therefore, that the judgment and opinion of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

HARRY McMULLAN,
Attorney General
of North Carolina,

RALPH MOODY,
Assistant Attorney General
of North Carolina,

Counsel for Respondent,
State of North Carolina.

APPENDIX.

STATE v. DAVID BROCK
(Filed 31 October, 1951)

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, 16 September, 1949 (G. S. 14- 31.)

There was verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for defendant, appellant.

DEVIN, C. J. This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

VALENTINE, J., took no part in the consideration or decision of this case.

BARNHILL and JOHNSON, JJ., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.

MOTION BY THE STATE THAT A JUROR BE WITHDRAWN AND A MISTRIAL ORDERED AND THE CASE CONTINUED PENDING THE FINAL JUDGMENT IN THE CASE OF "STATE v. ELMER MATTHEWS AND JIM COOK."

BY THE COURT: THE COURT FINDS AS A FACT that the Solicitor for the State tried two cases growing out of the same transaction, STATE v. JIM COOK, and STATE v. ELMER MATTHEWS, and that the evidence in said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense; that the defendants Jim Cook and Elmer Matthews were convicted at this term of court on the charge of Assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of "State v. David Brock," and during the course of the trial undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State. Whereupon, counsel for said defendants advised them not to testify that to rely upon their constitutional rights not to give testimony in respect to matters that would tend to incriminate them for that no judgment had been entered in their cases and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered and the Court ruled that said defendants would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court. The Court being of the opinion that the ends of justice require that the State have available for its testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court, in its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued.

DEFENDANT OBJECTS to the finding of facts, conclusions of law and the ruling of the Court. Overruled. EXCEPTION.

BY THE COURT:

Ladies and Gentlemen of the Jury, you have been listening for a part of yesterday and today to the trial of the case of "State v. David Brock" and have heard some argument in respect to the testimony of certain witnesses and part of the argument you did not hear, but the State having under-

taken to offer the testimony of two witnesses, Jim Cook and Elmer Matthews, and for certain reasons that have been made to appear to the Court, the testimony of those witnesses, at the present time, is not complete and available to the State, the Court is of the opinion that the ends of justice require that this case not be completed and that a mistrial be ordered and this case continued to such time as the testimony of those witnesses might be available for the State without any legal objections to it. Therefore, the Court in its discretion has withdrawn a juror and ordered a mistrial in this case and the jurors will not be concerned with the case any further.

The Court desires to thank you.